INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA

(NICARAGUA v. UNITED STATES OF AMERICA)

VOLUME V

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE DES ACTIVITÉS MILITAIRES ET PARAMILITAIRES AU NICARAGUA ET CONTRE CELUI-CI

(NICARAGUA c. ÉTATS-UNIS D'AMÉRIQUE)

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The case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, entered on the Court's General List on 9 April 1984 under number 70, was the subject of Judgments delivered on 26 November 1984 (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392) and 27 June 1986 (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, I.C.J. Reports 1986*, p. 14). Following the discontinuance by the applicant Government, the case was removed from the List by an Order of the Court on 26 September 1991 (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Order of 26 September 1991, I.C.J. Reports 1991*, p. 47).

The pleadings and oral arguments in the case are being published in the following order:

Volume I. Application instituting proceedings; request for the indication of provisional measures and consequent proceedings; Memorial of Nicaragua (Jurisdiction and Admissibility).

Volume II. Counter-Memorial of the United States of America (Jurisdiction and Admissibility); Declaration of Intervention by El Salvador and observations thereon by Nicaragua and the United States of America.

Volume III. Oral arguments on jurisdiction and admissibility; exhibits and documents submitted by Nicaragua and the United States of America in connection with the oral procedure on jurisdiction and admissibility.

Volume IV. Memorial of Nicaragua (Merits); supplemental documents.

Volume V. Oral arguments on the merits; Memorial of Nicaragua (Compensation); correspondence.

In internal references bold Roman numerals refer to volumes of this edition; if they are immediately followed by a page reference, this relates to the new pagination of the volume in question. On the other hand, the page numbers which are preceded or followed by a reference to one of the pleadings only relate to the original pagination of the document in question, which, if appropriate, is represented in this edition by figures within square brackets on the inner margin of the relevant pages.

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L'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*, inscrite au rôle général de la Cour sous le numéro 70 le 9 avril 1984, a fait l'objet d'arrêts rendus le 29 novembre 1984 (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984*, p. 392) et le 27 juin 1986 (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 1986*, p. 14). A la suite du désistement du gouvernement demandeur, elle a été rayée du rôle par ordonnance de la Cour du 6 septembre 1991 (*Activités militaires et*

paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d’Amérique), ordonnance du 26 septembre 1991, C.I.J. Recueil 1991, p. 47).

Les pièces de procédure écrite et les plaidoiries relatives à cette affaire sont publiées dans l’ordre suivant :

Volume **I**. Requête introductive d’instance ; demande de mesures conservatoires et procédure y relative ; mémoire du Nicaragua (compétence et recevabilité).
Volume **II**. Contre-mémoire des Etats-Unis d’Amérique (compétence et recevabilité) ; déclaration d’intervention d’El Salvador et observations du Nicaragua et des Etats-Unis d’Amérique sur cette déclaration.
Volume **III**. Procédure orale sur les questions de compétence et recevabilité ; documents déposés par le Nicaragua et les Etats-Unis d’Amérique aux fins de la procédure orale relative à la compétence et à la recevabilité.
Volume **IV**. Mémoire du Nicaragua (fond) ; documents additionnels.
Volume **V**. Procédure sur le fond ; mémoire du Nicaragua (réparation) ; correspondance.

S’agissant des renvois, les chiffres romains gras indiquent le volume de la présente édition ; s’ils sont immédiatement suivis par une référence de page, cette référence renvoie à la nouvelle pagination du volume concerné. En revanche, les numéros de page qui ne sont précédés ou suivis que de la seule indication d’une pièce de procédure visent la pagination originale du document en question, qui, en tant que de besoin, est reproduite entre crochets sur le bord intérieur des pages concernées.

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MINUTES OF THE PUBLIC SITTINGS

held at the Peace Palace, The Hague, from 12 to 20 September 1985
and on 27 June 1986, President Nagendra Singh presiding

PLAIDOIRIES SUR LE FOND

PROCÈS-VERBAUX DES AUDIENCES PUBLIQUES

tenues au Palais de la Paix, à La Haye,
du 12 au 20 septembre 1985 et le 27 juin 1986,
sous la présidence de M. Nagendra Singh, Président

SEVENTEENTH PUBLIC SITTING (12 IX 85, 10 a.m.)

Present: *President* NAGENDRA SINGH; *Vice-President* DE LACHARRIERE; *Judges* LACHS, RUDA, ELIAS, ODA, AGO, SETTE-CAMARA, SCHWEBEL, Sir Robert JENNINGS, MBAYE, BEDJAOUI, NI, EVENSEN; *Judge* ad hoc COLLIARD; *Registrar* TORRES BERNARDEZ.

Also present:

For the Government of Nicaragua:

H.E. Mr. Carlos Arguello Gomez, Ambassador, *as Agent and Counsel;*

Professor Ian Brownlie, Q.C., F.B.A., Chichele Professor of Public International Law in the University of Oxford; Fellow of All Souls College, Oxford,
Hon. Abram Chayes, Felix Frankfurter Professor of Law, Harvard Law School; Fellow, American Academy of Arts and Sciences,
Professor Alain Pellet, Professor of Law, Université de Paris-Nord,
Mr. Paul S. Reichler, Reichler and Appelbaum, Washington, D.C., *as Counsel and Advocates;* and

Mr. Augusto Zamora Rodriguez, Legal Adviser to the Ministry of the Exterior, Managua, Nicaragua,
Miss Judith C. Appelbaum, Reichler and Appelbaum, Washington, D.C.,
Mr. David Wippman, Reichler and Appelbaum, Washington, D.C., *as Counsel.*

OPENING OF THE ORAL PROCEEDINGS

The **PRESIDENT**: Before turning to the judicial business of today's sitting, I have first the melancholy duty of recording the passing of two eminent former members, both of them also Presidents, of this Court.

Sir Percy Spender, who died on 3 May 1985, served as a Member of the Court from 1958 to 1967, and was elected President for the period 1964 to 1967. He had previously combined a career as a practising lawyer in his native Australia with active participation in politics; he was for 14 years a member of the House of Representatives of the Commonwealth of Australia. He held numerous ministerial posts, including the Ministry for External Affairs and Ministry of External Territories, and thereafter served for seven years as Australian Ambassador to the United States of America. On the international level, he took an active part in the United Nations General Assembly, of which he was Vice-President at the Fifth Session, as well as the International Monetary Fund and numerous international conferences. He was an active and energetic Member of the Court, and a vigorous President. In that capacity, he found himself charged with the delicate duty of using the President's casting vote in the controversial circumstances of the *South West Africa* case, a responsibility which he accepted with characteristic courage. His attentive concern for the special problems and duties of the presidential function also found expression in an article in a legal journal which is almost the only authoritative published study of the subject.

On 1 September 1985, Sir Muhammad Zafrulla Khan died at the age of 88. He began the practice of law as long ago as 1914, but soon began what was to become a very distinguished political career, first in British India, and then, after independence and partition, in Pakistan, of which he was Foreign Minister for seven years. His judicial career in the Court was unusual in that it fell into two distinct phases. He was elected a Member of the Court in 1954, and served as its Vice-President from 1958 to 1961. He then pursued his distinguished career in the political organs of the United Nations, serving as Permanent Representative of Pakistan to the Organization and as President of the Seventeenth Session of the General Assembly in 1962-1963. He was then re-elected to the Court from February 1964, and the respect and confidence of his colleagues was marked by his election as President of the Court for the period 1970 to 1973. He will be remembered as a judge who happily blended legal insight with shrewd political acumen; and as a President, he was gifted with a courteous authority which did much to ensure the efficient functioning of the Court, as it had also of the General Assembly.

I invite all those present to stand for one minute's silence in memory of the late Sir Percy Spender and Sir Muhammad Zafrulla Khan.

I have also to record with regret the resignation of a Member of the Court. On 23 August 1985, Judge Platon Morozov, who had been a Member of the Court since 6 February 1970, addressed to me his resignation as a Member of the Court in view of continued deterioration in the state of his health. His colleagues, who have greatly admired the fortitude with which he has devoted himself to the discharge of his duties despite continued and increasing ill-health over recent months, will share Judge Morozov's own disappointment that he has not been able to complete his mandate, and feel the greatest sympathy for him in his illness. He has been for us a stimulating and hardworking colleague, admired for his vigour in debate and his tenacity in advancing the view which he has believed to be right. We wish him a speedy return to health and a long and happy retirement.

The Court meets today to hear oral argument on the merits in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. The proceedings were instituted by an Application filed on 9 April 1984, accompanied by a request for the indication of provisional measures under Article 41 of the Statute of the Court. By an Order dated 10 May 1984, the Court indicated, pending its final decision in the proceedings, certain provisional measures, and decided that, until the Court delivers its final judgment in the case, it would keep the matters covered by that Order continuously under review.

The United States having contended that the Court was without jurisdiction to deal with the Application, and that it was inadmissible, the Court further decided that the written proceedings in the case should first be addressed to the questions of jurisdiction and admissibility. Following the filing of a Memorial and Counter-Memorial on these questions, and oral proceedings held in October 1984, the Court, by a Judgment dated 26 November 1984 found that it had jurisdiction to entertain the Application on the basis of Article 36, paragraphs 2 and 5, of the Statute of the Court. At the same time, on one aspect of the case, the relevance and effect of a reservation attached to the United States Declaration of acceptance of jurisdiction of the Court, the Court referred to Article 79, paragraph 7, of the Rules of Court, and declared that the objection by the United States to jurisdiction based on that reservation did not possess, in the circumstances of the case, an exclusively preliminary character, and consequently did not constitute an obstacle for the Court to entertain the proceedings instituted by Nicaragua. The Court further decided that it had jurisdiction, so far as the Application relates to a dispute concerning the interpretation or application of the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua, on the basis of Article 24 of that Treaty. It thus found that accordingly it had jurisdiction to entertain the case, and found also that the Application was admissible.

On 18 January 1985, a letter from the Agent of the United States of America was received in the Registry, stating that the United States had given the deepest and most careful consideration of the Judgment of 26 November 1984, to the findings reached by the Court, and to the reasons given by the Court in support of those findings. The letter continued:

> "On the basis of that examination, the United States is constrained to conclude that the Judgment of the Court was clearly and manifestly erroneous as to both fact and law. The United States remains firmly of the view, for the reasons given in its written and oral pleadings that the Court is without jurisdiction to entertain the dispute, and that the Nicaraguan Application of 9 April 1984 is inadmissible. Accordingly, it is my duty to inform you that the United States intends not to participate in any further proceedings in connection with this case, and reserves its rights in respect of any decision by the Court regarding Nicaragua's claims."

On 22 January 1985, the President of the Court made an Order, referring to the United States letter, and noting that the Agent of Nicaragua had informed the Court that his Government maintained its application and availed itself of the rights provided for in Article 53 of the Statute whenever one of the Parties does not appear before the Court or fails to defend its case. By that Order time-limits were fixed for the written proceedings on the merits of the case. The Memorial of Nicaragua on the merits was filed on 29 April 1985, but no Counter-Memorial was filed by the United States of America within the time-limit fixed therefore (31 May 1985), nor did the United States seek any extension of that time-limit. Accordingly, the case became ready for hearing on 1 June 1985.

I note the presence in Court of the Agent, counsel and other representatives of the Republic of Nicaragua; I note further that no representative of the United States of America is present in Court.

In accordance with its usual practice, and pursuant to Article 53 of the Rules of Court, the Court has decided, after ascertaining the views of the Parties, that copies of the pleadings and documents annexed shall be made accessible to the public with effect from the opening of the present proceedings.

The Court adjourned from 10.20 a.m. to 10.40 a.m.

STATEMENT BY MR. ARGÜELLO GÓMEZ

AGENT FOR THE GOVERNMENT OF NICARAGUA

Mr. ARGÜELLO GOMEZ: Mr. President, Members of the Court, today we face empty chairs on the side of the Respondent State. This is not the first time this has occurred. Just five years ago this Court and the United States Government under President Carter faced the same empty chairs when Iran failed to appear before this tribunal.

But the real novelty of the situation is that for the first time in the history of this Court and that of its predecessor, a Respondent State fails to appear *after* the Court has found that it has jurisdiction.

Once jurisdiction has been found, there is no shadow of a doubt as to the obligatory nature of a country's appearance. That is why the decision of the United States Government to disobey this tribunal has sent shudders throughout the international legal community and, yes, throughout the legal community in the United States itself.

Nonetheless, the distortion of reality by the present Administration of the United States is such that the fact that they appeared in the jurisdiction and interim measures phases of this case has been attempted to be portrayed as an example of good faith and respect for international law. As if the fact of accepting an invitation only to insult the host were a sign of good manners, as if the fact of being in contempt of court were a sign of obedience of the law.

When the present Administration of the United States announced that it would not participate further in these proceedings, it made a public statement that its principal reason for doing so was that this Court is a biased tribunal and that the United States could not hope to receive impartial treatment by the Court. Although it is generally in bad taste to recall the bad manners of others, I feel impelled to mention this fact because it sheds light on the character and actions of the accused Government and is useful in analysing *in absentia* the justifications this Government has for its illegal actions against Nicaragua.

In passing, it is useful to point out the obvious contradiction in affirming as reasons for non-appearance that the Court has no jurisdiction and in the same breath uttering contemptuous remarks on the impartiality of a Court before which the United States has been or has attempted to be a party to, many times in the past.

In passing, it might be useful to recall that in April of last year when Nicaragua initiated this case, this Court in view of the urgency had to suspend hearings that were at that moment going on in a case concerning the United States and Canada.

Nicaragua has confidence in the justice of its cause in the fairness and juridical impartiality of this highest of world tribunals and, yes, Nicaragua is also confident that some time in the future a law-abiding Government in the United States will honour the judgment rendered by this Court and accept the moral necessity of the rule of law.

Article 53 of the Statute states:

> "1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.

> 2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law."

In the present instance, for the first time we have a situation in which the Court has satisfied itself that it has jurisdiction. This finding of the Court was taken after hearing lengthy arguments of all the legal talent that a world power could muster. No new arguments or facts have been presented since that decision was taken that could — if that were possible — modify that finding of the Court.

Another particularity of the present proceedings is that in the initial phase of the interim measures of protection, all the salient facts of this case were presented. The United States participated in full in that phase with an impressive array of legal advisers; they had adequate opportunity to dispute the facts and their legal significance. In other words, this is not a case in which the absent party has not had legal opportunity to dispute the facts or the law, and that therefore the Court has to supply arguments the other party might have made in order to fully satisfy itself. This is very clearly a case in which the United States Government and its formidable legal team ran out of arguments and preferred to contemptuously disregard these proceedings, this tribunal and the rule of law.

The facts in this case are a matter of public knowledge. No one in the world has seriously disputed their veracity. They are backed by ample admissions made at different periods by the highest authorities in the United States Government.

The original argument put forward by the United States Government before this Court, alleging some purported right of collective self-defence, in itself, is an admission that the facts before the Court are true but that they were supposedly justified by this right of collective self-defence.

Professor Brownlie will address the legal consequences of this admission. At this point I will only emphasize that even this pretence of collective self-defence has been publicly abandoned by the United States Government.

As soon as the United States announced its intention of not participating further in these proceedings, the hypocritical excuse of self-defence was immediately dropped, and President Reagan stated on 21 February of this year that it was United States policy to seek to remove the Nicaraguan Government. He emphasized this policy in the most incredibly arrogant fashion by stating that it would only change if the Nicaraguan Government cried "Uncle".

In late April of this year, Nicaragua's legal team had a meeting in Washington, D.C., to put the finishing touches to our Memorial on the merits of this case.

Our meeting coincided with debates in the Senate and the House of Representatives of the United States on President Reagan's request for further funding for the mercenary army.

Mr. President, Members of the Court, my personal impression on seeing these debates on public television channels is very difficult to describe. There we were preparing a very careful legal argument backed by nearly 1,500 pieces of documentation to prove to this Court that the United States Government was doing precisely what was being publicly discussed by the United States Congress.

The facts are very clear, they are in the main in the public domain and certainly the thousands of documents we have already introduced to this Court, prove the obvious.

Nonetheless, for the purpose of this hearing we have brought up to date the documentary evidence and have proposed to this Court the testimony of very qualified witnesses. These documents and witnesses together with all the documentation previously introduced will certainly satisfy the Court that Nicaragua's claims are well-founded in fact and in law.

On June 19 of this year several United States marines were killed in El Salvador. A month later, a letter was delivered to my Government by the United States Ambassador in Nicaragua, throwing responsibility for that incident on Nicaragua and threatening the use of force if "acts of terrorism against United States citizens . . . (occurred) . . . in other countries of Central America, or elsewhere".

In effect, the United States Government was making Nicaragua responsible for any acts against its citizens anywhere in the world. President Reagan went so far as to include Nicaragua in a list of five purported terrorist nations.

In its answer Nicaragua recalled that the United States actions against Nicaragua constituted acts of State terrorism and that these activities were precisely the subject-matter before this Court and invited the United States Government to defend itself before this tribunal and further invited the United States to present any evidence it claimed to have against Nicaragua before this tribunal.

The same offer was publicly made by President Ortega of Nicaragua before a concentration of more than 500,000 people that gathered this past July 19 to celebrate the sixth anniversary of Nicaragua's revolution. In effect, the President's speech centred on these proceedings and the hope for peace they represented for Nicaragua.

The invitation made by President Ortega to President Reagan is answered today with an empty chair. The seat of justice is definitely empty in the United States.

Nicaragua's claim that the United States is responsible of practising State terrorism is based on the facts before this Court.

It may be recalled that the methods and actions employed in the policy of the United States against Nicaragua include among others the following:

(*a*) the mining of Nicaraguan ports;
(*b*) the attack against fuel storage facilities at the port of Corinto, which rendered necessary general evacuation of the population of that port;
(*c*) the systematic murder and abduction of peasants, elderly persons, women and children by mercenary bands financed by the United States Government;
(*d*) the criminal assault on a passenger aircraft belonging to a Nicaraguan State airline in Mexico;
(*e*) the explosion in the baggage claim area of our international airport which caused the death of four airport workers;
(*f*) the manual entitled *Psychological Operations in Guerrilla Warfare* produced and distributed by the Central Intelligence Agency, which is an instruction and a guide to commit acts of terrorism.

Mr. President, Members of the Court, on 19 July 1979 the Nicaraguan people overthrew the Somoza dictatorship that had received the political, military and financial backing of the United States Government during nearly five decades. In that period, United States companies made large profits in gold, mining, banana production, lumber and other businesses. These companies were seen by the Nicaraguan people as partners of the Somozas in the rape and exploitation of Nicaragua.

After similar social changes in other countries, the anger of the people was manifested many times by acts against the lives and property of United States citizens and businesses.

Nothing like that happended or has happened to this day in Nicaragua. No American lives were threatened or hurt. No American businesses were confiscated.

As a matter of fact there are thousands of United States citizens living inside Nicaragua, and hundreds of American citizens visit Nicaragua every month with no danger to their lives except that coming from the activity of the mercenary forces to which every living being is subject to in Nicaragua.

This point serves to emphasize the incredible distortion of reality portrayed by the United States Government in pretending to justify aggressions against Nicaragua, the same distortion of reality that the United States perpetrated when it publicly accused this most respected international tribunal of bias.

The normal consequence of State responsibility is the payment of compensation and in the circumstances of this case this aspect of the matter looms large. As the Court will recognize, this is inevitable for not only have heavy losses, both human and material, been caused as a direct result of United States action but a major tactic of the United States Government has been to create critical weaknesses in Nicaragua's economy and infrastructure in order to achieve its publicly stated purpose of overthrowing the lawful Government of Nicaragua.

For practical and technical reasons, on behalf of my Government, I am requesting the Court to reserve the issue of compensation for a separate phase of these proceedings, and there are, of course, precedents for this course. This request will be formally renewed when I present submissions at the conclusion of the oral argument.

In my submission the separation of the question of compensation is justified by considerations of logic and convenience and this proposal underlines the importance of the question for Nicaragua. The significance of the question will also be evident when Mr. Huper, the Minister of Finance in my Government, gives his oral testimony. While the process of the assessment of the compensation due to Nicaragua must lie in the future, I would like to make a suggestion concerning the methods of assessment, particularly with reference to direct damage caused to the economy of my country by the military and paramilitary operations directed by the United States. I would propose that the assessment of compensation be the subject of a report by an independent specialized organization to be appointed by the Court such as the World Bank, the International Monetary Fund or the United States Economic Commission for Latin America. The proposal is offered in a constructive spirit and with full appreciation of the fact that the Court will control all matters of procedure as it sees fit.

On this year of the 40th anniversary of the creation of the new world organization after the tragedy of the Second World War, on your shoulders rests the responsibility of making international law into an effective instrument for world peace.

Your authority is being challenged by a superpower that wishes to set law aside in order to have a free hand for destroying a small nation.

This challenge started when you gave your Order in May of last year that Nicaragua's sovereignty should be respected by the United States. That Order was blatently disregarded by that Government.

The attacks against Nicaragua have increased since that Order was given. Since then thousands of Nicaraguans have been killed, maimed and left homeless. Every day the newspapers announce new instances of atrocities committed by the mercenary forces.

Three of our witnesses, Commander Carrión, Professor Glennon and Father Loison, will attest to the human suffering this has caused in Nicaragua.

While this continues, recent revelations prove beyond a doubt that the National Security Council of the United States is responsible for the direction of the mercenary forces. This Council, headed by the President of the United States, directs the strategy and even selects the targets to be destroyed by the mercenary forces. In effect, the commander-in-chief of the United States armed forces is also commander-in-chief of the *contra* forces. Whether this violates American law, as is now being debated in the United States Congress, is irrelevant to these proceedings.

It certainly violates international law and converts the United States Government into a terrorist State.

St. Augustin wrote "set justice aside, and what are kingdoms but robber-bands writ large?". In these proceedings we will prove beyond a doubt that the United States Government has set justice aside and is guilty of State terrorism. Nicaragua challenges the United States Government to defend itself before this tribunal and the world.

Mr. President, Members of the Court, in accordance with the instructions received, Nicaragua will present its arguments after the production of the evidence. For this reason the witnesses, whom Nicaragua has communicated it intends to call, will be examined first. The order in which they will be called will follow the order listed in the communication addressed to the Court, unless the time remaining for the examination of the following witnesses in the order mentioned makes it more expedient to alter the order given. This of course will be communicated as soon as possible to the Court. The first witness Nicaragua requests the Court to call is Commander Luis Carrión, who will be examined by Professor Brownlie.

EVIDENCE OF COMMANDER CARRIÓN

WITNESS CALLED BY THE GOVERNMENT OF NICARAGUA

The **PRESIDENT** : I call on the witness, Commander Luis Carrion, to make his solemn declaration and then to give his testimony.

Commander **CARRION** : I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth.

Professor **BROWNLIE** : With your permission Mr. President, Members of the Court, I shall conduct the examination of this witness.

Question : Please state your full name.

Answer : My name is Luis Carrion.

Q. : When and where were you born?

A. : I was born in Nicaragua on 18 November 1952.

Q. : Where did you receive your education?

A. : Well, I received my primary and secondary education in Nicaragua, then I went to university for two years in the United States and then back to Nicaragua.

Q. : You are an official of the Government of Nicaragua?

A. : Yes, I am an official of the Government of Nicaragua.

Q. : What position do you presently hold and what positions have you previously held in that Government?

A. : I am presently Vice-Minister of the Interior, but I was, until the beginning of 1980, Vice-Minister of Defence.

Q. : Would you please describe the responsibilities involved?

A. : Yes. I am in charge of all State security matters. That includes the searching, collecting and keeping of all the information related to any subversive activities against my country, and it also includes taking the necessary and legal steps to prevent or stop those activities. I have also been appointed by the President as a special commissioner — an extraordinary commissioner — of the Government to the northern provinces of my country — these ones over here (indicates on map) — to co-ordinate all government activities, be these civilian or military. I have to mention that these provinces represent the main war zone at the present moment.

Q. : Could you describe your military responsibilities in more detail?

A. : I have the responsibility, within my responsibilities, to supervise military operations in the area. In carrying on these responsibilities I have to go into the field, talk to the field commanders and I sometimes have to interview prisoners directly, corroborate personally some of the most important information, and inspect weapons and other military equipment that might be captured by our troops.

Q. : In carrying out your responsibilities, do you normally wear a uniform?

A. : Yes, I normally wear a uniform.

Q. : Referring to your special responsibilities as First Vice-Minister of the

Interior, is it one of your responsibilities to be aware of and to monitor military and paramilitary activities against Nicaragua?

A. Yes, that is within my frame of responsibility.

Q. How do you monitor these activities?

A. Well there are Ministry of Interior officers all around the country on a territorial basis. Whenever a military or paramilitary activity occurs within their territory of responsibility they have been instructed by me to prepare a detailed report on the events that occur. These reports are sent to regional offices and to a national office. This last office is directly under my responsibility.

Q. Could you tell the Court how long it takes from the time an attack occurs until the information is passed through the reporting system to you?

A. Yes, I usually receive the information within 24 hours, but certainly before 48 hours after the events occur.

Q. Are there other sources of information which you use?

A. Yes, as normal procedure we use several sources of information and we cross-check them in order to arrive at conclusions. Some of these sources are the co-ordination with the Nicaraguan army, our intelligence services, personal interviews, statements from people who accept the amnesty law. I have to inform you that my country, my Government, put into effect an amnesty law by which every person who is involved in military activities against the Government can conduct and live a normal life just by surrendering his weapons. We also have information from people we have infiltrated into the *contra* groups. These I would say are the main sources of information for us.

Q. In what form are records kept?

A. Records of military and paramilitary activities are a part of the whole reporting system we have. They include exact information of date, place, participating forces, civilian and military casualties on the Government side, verified *contras* casualties and also a summary of the material destruction that occurred as a result of the attack or combat.

Q. Would you tell the Court when the organized military and paramilitary activities against Nicaragua began?

A. Organized activities began by December 1981.

Q. In what condition were the anti-government forces prior to December 1981?

A. They were just a few small bands very poorly armed, scattered along the northern border of Nicaragua and they were composed mainly of ex-members of the Somoza's National Guard. They did not have any military effectiveness and what they mainly did was rustling cattle and killing some civilians near the border lines.

Q. What differences did you notice in those activities in that period of December 1981 and thereafter?

A. After December 1981 we began to observe that *contras* started to act on the basis of their centralized plans, military training camps were set up in Honduras and in the United States for training the *contras*, new weapons were delivered to the *contra* forces and the centralized command was set up in which most of the *contra* forces were put since December 1981.

Q. To what do you attribute these differences which you noticed?

A. These differences were due to a direct involvement of the United States Central Intelligence Agency, CIA, with the *contras* in the first event, and secondly, they were due to the approval of $19 million by the United States Congress for the CIA to carry on paramilitary activities against Nicaragua in December 1981.

Q. When did the CIA-trained and equipped forces launch their first attacks against Nicaragua and what form did those attacks take?

A. The first organized attack occurred at the end of 1981. For the first time the *contra* offensive would mean the code word "navidad roja", which means Red Christmas time. By this plan, the purpose of it was to launch simultaneous attacks on border posts in the north eastern part of the country, which is a very isolated part of the country, and at the same time try to introduce a larger force in order to take hold of a territory and then ask for international support. The *contras* could not achieve their purposes, they were rejected back to the camps in Honduras, but there was a rise in civilian and military casualties.

Q. To your knowledge, was Red Christmas the first plan with a specific name?

A. Yes, it was the first plan with a specific name. Before that the *contras* did not even act under a plan.

Q. You have used the term "*contras*" to describe the anti-government forces. Can you tell the Court whether that was the term usually employed to describe those forces?

A. Yes, "*contras*" is one of the terms usually employed to describe those forces. They are also called "mercenaries", among other names they receive.

Q. You have referred to the Red Christmas plan and the attacks associated with that. What other attacks did the *contras* make against Nicaragua at this particular period?

A. During the year 1982 we saw a gradual rise in hit-and-run attacks across the border, which were increasingly deadly and aggressive. By the beginning of 1982, the end of the first quarter, there were some bombs that exploded — one in a commercial Nicaraguan airline, in a plane, in Mexico airport — and the second exploded in Nicaragua airport. Also, there were blown up, sabotaged, two bridges — one over the Rio Negro river and the second over the Ocotal river. These two bridges are very near the Honduran border, one about here and the second is about here (indicates on map), on the Panamerican highway, which is the main road for Central American international traffic.

Q. Apart from the hit-and-run raids across the border and the sabotage, what other steps did the *contras* take against Nicaragua in 1982?

A. By the end of 1982 they launched another major offensive against Nicaragua.

Q. Surely, if the *contras* were organized only late in 1981, why did they not launch a major military offensive for almost a full year?

A. This is because the CIA needed some time to transform the small and badly-trained groups which constituted all anti-government forces prior to the end of 1981 into a well-equipped army capable of launching co-ordinated attacks. They needed time to recruit new men, to train them, to arm them, to instruct them in the use of new communications equipment, and organize them.

Q. At the end of the first major military offensive at the end of 1982, how many forces did the *contras* have?

A. There were approximately 3,500 men.

Q. Would you tell the Court where these men were recruited?

A. Yes, these men were recruited from two main sources. One was the ex-members of the Somoza's National Guard, who were scattered in refugee camps in different countries of Central America and also in the United States.

The second source for recruitment was the peasants, especially those who lived near the northern border. These peasants were recruited forcibly by the *contras*.

Q. What was the role of the ex-members of the National Guard?

A. The ex-members of the National Guard formed the core of the *contra* army the CIA was setting up. They all were promised and received regular salaries, which ranged from 300 dollars a month for the common soldier, let's say, up to 1,500 dollars a month for the higher officers. These officers were also put as leaders and commanders of the commanding structure and the operational military units.

Q. Would you please describe the method of peasant recruitment in more detail?

A. The way that the *contras* used to recruit the peasants was the following. They usually came to a peasant community very well armed, and then they would go about killing those persons who were most conspicuously identified with the Government, whether they be Government workers or not. These killings would create in the peasant community a climate of terror and fear, after which they would take forcibly the rest of the peasants into the *contra* unit. As a matter of fact, as this way of recruiting was extended, many communities and small villages were practically depopulated because the peasants had to flee from the *contras*.

Q. Were all the peasant recruitments accomplished by means of force?

A. No, not all of them were recruited by force, but the majority of them were. Up to now there are a little over 1,500 persons that have accepted Government amnesty law, and most of them have declared that they were forcibly recruited by *contra* units.

Q. Where did the *contras* obtain their weapons?

A. Prior to the end of 1981 the *contras* had some weapons that the ex-members of the National Guard had taken with them when they fled from the country after the triumph of the revolution. But as the *contra* forces began to grow as a result of the CIA's recruiting policies, they needed more and more effective weapons so the CIA gave them FAL rifles. The FAL rifle is a modern assault rifle which many modern armies currently use and from then on, that is from the end of 1981 on, the CIA has supplied the *contras* with all the weapons they have needed.

Q. Would you tell the Court how the *contras* were trained, and by whom?

A. Yes, there were several military training camps set up in Honduras and in the United States. Here in these camps the *contras* received a general military training which included shooting, tactics, physical exercises and the basic soldier's training. They also were trained in the use of some other weapons like mortars, rocket launchers, grenade launchers and heavy machine guns. Apart from the training camps, there were some training sites for specialized training for special operation groups. They received a training in sabotage, demolition and the use of explosives. In 1982, up to the beginning of 1984, the main part of the training was given by Argentinian mercenaries hired by the CIA from which they received a monetary payment. But since the end of 1981, there were also CIA officers directly involved in the training of the *contras*, specially or particularly in the area of sabotage and demolition — specialized training for special operation groups.

Q. In your professional opinion, were there any other significant factors that set the stage for the beginning of the *contras'* major military offensive at the end of 1982?

A.: Yes. At the end of 1982, the *contras* received new funds from the United States amounting to $30 million. From this date on, we started to notice that a more or less regular pattern was emerging and that was that after every infusion of funds, the *contras* would launch a new major offensive against my country. The offensive would gradually diminish as the funds were being used up until the new infusion came, when the pattern would repeat itself.

Q.: Would you please describe the *contras'* military offensive at the end of 1982?

A.: Yes. The *contras'* military offensive at the end of 1982 was called "C Plan" or "strategy of terror". The purpose of this offensive was, as in the Red Christmas plan, to take over the town called Jalapa and then install a provisional government and call for international recognition. For carrying out this plan they concentrated the troops around Jalapa right on the border line and from there they did many attacks with artillery support, as they were not able to take over Jalapa, but as a result of this offensive many towns were put under artillery fire and there were many civilian casualties as well as military casualties.

Q.: After this offensive of 1982 was defeated, what were the next steps taken by the *contras*?

A.: Well, after the 1982 offensive was defeated the *contras* changed their way of operating. They started to infiltrate groups, small groups at first, deeper into Nicaraguan territory where they would have more objectives within reach, let's say — State farms, co-operatives, grain stores, health centres and so on — and it is during this period when the *contras* were developing in a regular manner, that ambushes occurred on the road against any vehicle, civilian or military.

Q.: Can you tell the Court what circumstances made this possible?

A.: This was made possible mainly because the CIA had perfected their logistic systems, especially because they had given the *contras* several aeroplanes which they could now use to resupply the military units operating deep within the country.

Q.: Could you say anything more about the way in which the provision of military aeroplanes to the *contras* affected their tactics?

A.: Prior to the *contras* receiving the aeroplanes, *contras'* military units could only operate within Nicaraguan territory for very short periods of time, because they would run out of ammunition and would use up other equipment; then they had to go out again to the camps in Honduras to be resupplied in order to be able to continue operating. But after they received the aeroplanes they now were able to remain for longer periods of time, and do more damage as a consequence within the territory, because the planes would come right to the place where they were and drop their supplies for them, so that they did not need to go back to Honduras to resupply.

Q.: What evidence did you have of the involvement of the United States Government in these air supply operations?

A.: United States involvement in these air supply operations is very clear. First of all, the planes were provided by the United States; but not only that, the main base from which these planes operate in Honduras — which is called El Aguacate and is somewhere around here (indicates on map), 80 kilometres from the Nicaraguan border line — was improved and enlarged from 3,000 feet to 5,500 feet, by United States Army engineers. This was done in the course of 1983 under the cover of military exercises that were being carried on by the United States in Honduras at that time. The exercises were called Big Pine I and Big Pine II, but there are other ways of United States involvement in the air supply operations. We know this from several sources; one of those sources is a member of the crew of a *contra* aeroplane that the Nicaraguan army brought down in September 1982, and he declared that the chief of the Aguacate base was a United States officer called, or known as, Major West — we do not know if this is a real or a false name, probably it is a false name. This Major West was in charge of co-ordinating the whole operation — the air supply operation — he directed the planes when they were going to drop the supplies and there was another American officer there who was known as Sergeant Mark. He was in charge of packing the supplies in such a way that they wouldn't break when dropped by the plane. Now, they used to parachute the supplies and this was needed because the guardsmen did not know how to pack these supplies.

Q. Can you tell the Court what effect these new tactics — these new sophisticated air supply operations — what effect these new tactics had?

A. The main result of these new tactics was an increased number of civilian victims as a result of *contra* attacks and a greater degree of material destruction. The *contras* would come, organizing ambushes against any vehicle going into the rural areas. There were several passenger vehicles ambushed and sometimes every single passenger has been killed. The guerrillas would increase their attacks against civilian objectives, like farms, either State farms or co-operative farms, or individual owners' farms. They attacked and destroyed schools, health centres, grain stores and every piece of economic infrastructure they could attack.

Q. Were these attacks on the civilian population isolated episodes by certain elements in the *contra* forces, or did they show some systematic pattern?

A. Yes, they clearly showed a systematic pattern and these attacks against civilians and civilian objectives took place wherever the different *contra* military units were operating, no matter how far apart they were from one another. They consistently acted in this manner. We also know from prisoners and some *contra* leaders' statements that they received specific instructions so as to carry out these types of operation and this is made very clear in the manual the CIA prepared for the *contras* and which is called *Psychological Operations in Guerrilla Warfare*.

Q. The manual in fact is part of the evidence already submitted to the Court, but perhaps I could ask you to remind the Court what the purposes of that CIA manual were?

A. Yes, this manual was prepared by the CIA and, by the way, the Spanish version is a very poor translation from English. It was prepared with the main purpose of instructing the *contras* on how they should use terror tactics with great effectiveness. I would like to call your attention to Chapter 3, heading No. 3, also, which is called "Implicit and Explicit Terror" and another heading, No. 5, which is called "Selective use of violence for propaganda effects". Under this heading, but also under other headings, the manual clearly instructs the *contras* in killing justices of peace, police members, prominent leaders, and, etc., — that means everybody else. They also suggest and give the *contras* some hints on how to fabricate martyrs for their cause. All of these terrorist instructions have the main purpose of alienating the population from the Government through creating a climate of terror and fear, so that nobody would dare to support the Government.

Q. How widely distributed, to your knowledge, was this CIA manual?

A. It was very widely distributed. We know this because we have captured many copies of the manual in combats we have had with different *contra* military units operating in different parts of the country. But also we know from the statement of a *contras* leader who defected that about 2,000 copies were distributed among the different military units of the *contras*, and that every member of the *contras* was obligated to study the manual, and the commanders of the different forces guaranteed that this would be done effectively.

Q. Were the methods and tactics described in this manual actually put into operation?

A. Yes. They were put into operation. There are hundreds of examples of *contra* activities following the manual's instructions. I will give just some examples in order to illustrate to you how this was done.

On 13 May 1984 in the eastern department of Saslaya, a peasant community was taken over by the *contras*, and they murdered 34 people, all of them civilian. Amongst the 34 people killed there were five women and nine children who happened to be relatives of some militia men and some of them were members of a peasants' organization which is supportive of the Government.

On 5 October 1984 the *contras* assassinated the president of a workers' union in La Sorpresa, Jinotega, which is about here (indicates on map).

On 1 September of that same year, in a road that goes from Puerto Cabezas here to the mining district here (indicates on map), a truck belonging to a religious organization, a protestant religious organization, was ambushed, and there were seven civilian workers killed and two civilians wounded, a woman and her little child, only 45 days old.

These are just a very few examples of how the tactics recommended by the CIA manual have been very well applied by the *contras*.

Q. Would you please tell the Court whether the *contras* launched any major offensives in 1983?

A. Yes, the *contras* launched a new major offensive by the end of 1983. This offensive was called Plan Sierra — sierra means a chain of mountains.

Q. In addition to what you have already mentioned, what were the other factors which prepared the way for that particular offensive?

A. Once again in December 1983 there were funds approved by the United States for the *contras*. This time they were $24 million.

Q. What was the number of men in the *contra* forces at this time?

A. There were somewhere around 7,000 people.

Q. And how did this offensive at the end of 1983 evolve?

A. The first objective of Plan Sierra was again to take over Jalapa — over here (indicates on map) — and install a provisional government who the CIA informed the *contras* would be immediately recognized by the United States Government.

To achieve this objective they concentrated most of the forces again around Jalapa but also introduced some diverting forces into the interior of the territory. When they couldn't take over Jalapa and the main forces were repelled back to Honduras they changed the main objectives at that point and what was at the beginning a diverting effort changed into the main effort, so they took — I am talking about the first quarter of 1984 — the forces which were defeated around Jalapa and introduced them in this direction with the main purpose of disrupting the economy as much as possible; so they were directed to hit all economic targets possible. And it is of this year, 1984, that material destruction rose very steeply. At the end of the year and the beginning of the year, in Nicaragua we are picking the coffee crop and one specific objective of the *contra* forces was to make it impossible for Nicaragua to pick the crop. In order to do this they attacked coffee plantations, they killed some coffee pickers, they also threatened coffee growers in order that they would not take the crop from the field, and to make them know that this threat was for real they set afire, destroyed completely, eight farms and killed three coffee growers. I mean I am talking about private proprietors who used to grow coffee. So this was the main effort in the first half of 1984 after the take-over of Jalapa had failed.

Q.: Can you describe the type of military organization which the *contras* had up to this point?

A.: Up to this point, the main *contra* forces were all under a single and unified command. The head of this command was something called a joint staff major; this joint staff major was conformed by a CIA officer known as Colonel Raymond and by Enrique Bermudez who is in charge of the military operations on the part of the *contras*. Under this joint command, there is a complex system of different services for the military combat units. They have a medical service, a public communications service; they have what they call civilian services, a supply centre and what they call the strategic command which is the operational head structure. Under the strategic command there is a logistic section, a school section, that is a training section, a special forces section — what they call internal forces, air force section, and what is known as the tactical operations command. Under this tactical operations command are the operational military units which are called regional commands. The regional commands have perfectly well-defined operational areas where they normally act and they are the superior structure under which are the so-called task forces. Each regional command has under its command three or four task forces which are then subdivided into smaller units.

This is then the structure corresponding to a fairly well-developed army and up to this point, that is what the *contra* is, a very well-equipped and organized army.

Q.: In your professional opinion did the United States play a role in this organizational structure?

A.: Yes, this structure was designed by the CIA and was implemented by the CIA and the CIA controls its day-to-day operations. Sometimes they even say which force should attack which objective, and this influence of the United States in constructing this complex organization shows even in the use of words. For instance, the phrase "Task Force" which in Spanish, the Spanish literal translation is Fuerze de Tarea, does not exist as a phrase in Spanish. It is just a translation of an English phrase. As far as I know that phrase is not regularly used by Latin American armies. That is just one little example of how even the language shows up the United States influence in setting up this whole structure.

Q.: Were there other ways in which the United States assisted the *contra* forces?

A.: Yes, the United States assisted the *contra* forces in other fields, mainly by funds, intelligence, communications, weapons and logistics. I would say these were the main areas in which United States assistance to the *contras* has occurred.

Q.: First of all I would like to ask how did the United States assist the *contras* in relation to weapons?

A.: As I said before, prior to the end of 1981 the *contras* had the weapons they had taken from Nicaragua when the National Guards abandoned and fled to other Central American countries. But when the CIA needed new weapons for the increasing *contra* force, the CIA just got the weapons, FAL rifles as I said before, and delivered these weapons to them. That was in the beginning. Afterwards CIA AK 47 rifles — which are also very modern assault rifles — were given to the *contras*. The *contras* never had to buy weapons in the market. The CIA has always supplied them. And recently the CIA is supplying the *contras* with a G 3 rifle, which is the German equivalent to the FAL rifle, and it is the one that they are supplying right now. They supply not only rifles, but other types of weapons too. They supply them with a disposable rocket launcher called a light offensive weapon or LOW with a grenade launcher called M 79 grenade launcher, they supply them with mortars of 60 millimetres and 81 millimetres — the last one is considered as medium range, in the practical sense, an artillery weapon. They also supply them with heavy machine guns, mostly M 60. All of these are made in the United States and came directly from the United States to the *contras* in Honduras. They also supplied the *contras* with all sorts of high-powered explosives, mainly the plastic explosive known as C 4 and mines of all sorts, anti-personnel mines, anti-carrier mines, of different sizes and types and TNT and other explosive devices for sabotage.

Q.: Did the assistance in relation to weapons go beyond the mere supply of weapons? Were other facilities provided?

A.: I do not understand the question. Would you please repeat it?

Q.: Were other facilities provided such as training in the use of weapons made available, or was it simply a case of the supply of the weapons themselves?

A.: I said earlier in my declaration that the CIA set up a full training structure with specialized training officers to teach the *contras* how to use these weapons. Many of them never had anything to do with weapons, specially the sophisticated weapons, like some of the mines given to the *contras*, or the military explosives. The United States provided the *contras* with the complementary necessary military training, or specialized training, in order that the *contras* will be able to use these weapons.

Q.: Now I would like to ask about United States assistance to the *contras* in relation to intelligence.

A.: This is a very important field of assistance from the United States to the *contras*. The United States makes a regular overflight of Nicaragua with specialized surveillance planes of different sorts. They are very well equipped with photographic and electronic equipment. The United States has some satellites and surveillance functions over Nicaragua. They also have stationed for periods of time specially electronically-equipped ships just off the Nicaraguan coasts and they have installed radar and communications interception centres in Honduras. They also try to get the services of some Nicaraguans who are in the army or some sensitive structure by paying them and from all this array of intelligence gathering systems they collect very exact information about the Nicaraguan army — where the troops are, where they are moving and so on, and all this information is delivered to the *contras* for their use. This happens every day. The United States gives all the information it can collect and that is of interest to the *contras* — they give it to them. The United States has also assisted the *contras* in setting up an intelligence organization. This is another field of assistance for the *contras* in the intelligence area.

Q.: Was there also assistance in relation to communications?

A.: Yes. There was much assistance in the communications area. In the first place the United States provided the *contras* with very modern and effective military communications systems. They gave them different types of equipment — equipment that is used for communications between the regional commands and the tactical operations command, or strategic command, those are usually PRC-77 back radios which can be carried on the back. Also the use of a shortwave radio, South Quartz is the name of it, and they also give the *contras* small walkie-talkies for communications among the small units within a task force or regional command. But I would say that the most important assistance in the communications field has been the preparing of some sophisticated codes for the *contras* to cover their communications. They also prepare for them conversational tables which are simpler codes for less important communications. The *contras* had no capacity at all for preparing or manufacturing these types of codes. In the past Somoza's National Guard did not use code — never had codes in use extensively.

Q.: I would like to pursue the question of assistance even further and try your patience more. How did the United States assist the *contras* in relation to logistics?

A.: In relation to logistics, the United States through the CIA would calculate what the *contras* needs were in all sorts of equipment, personnel equipment and then deliver those supplies to the *contras* in Honduras. This flow supply included from a pair of boots up to mosquito repellent. They gave them everything they needed — uniforms, canteens, Sam Brownes, light packs, special caps with a mosquito net and also ammunition for the weapons.

Q.: Apart from the United States involvement with the *contras*, did United States military or intelligence personnel themselves participate in attacks against Nicaragua?

A.: Yes, on many occasions United States military or CIA personnel participated in direct attacks against Nicaragua.

Q.: Can you say when this began?

A.: This began in September 1983.

Q.: Would you please give the Court, if you can, some examples of direct attacks by United States military or intelligence forces?

A.: In September 1983, a special team from the CIA blew up a pipeline, just out of Puerto Sandino, which goes into the sea, where ships pick up and discharge oil; they used underwater high explosives to do this. They came from a mother ship which was stationed some distance from our coast.

In October of that same year several speedboats armed with 20-millimetre cannons attacked oil storage facilities in the port of Corinto, which is here (indicates on map) and is the main port of Nicaragua. As a result of the attack the three big oil-storage tanks were set on fire. This fire was a very big one and put in peril the whole Corinto population, which is around 20,000 people, and they had to be evacuated from the town to some place else. Many millions of gallons of oil were lost, and the oil storage tanks were completely destroyed.

Another example occurred in September 1984 when several planes and modern attack helicopters made an aerial attack against a military training camp of the Nicaraguan army in a place called Santa Clara, here near the Honduran border (indicates on map). In this last attack there were two United States citizens who participated directly and they got killed when the helicopter from which they were attacking was brought down by ground fire from the Nicaraguan army. They happened to be members of one of the United States states' national guard.

I think these three examples may illustrate to you the direct participation of United States personnel in actions against Nicaragua.

Q.: What were the purposes of these attacks?

A.: The main purpose was to destroy all capabilities of my country for storing or receiving oil. That is why most of the attacks centred on the Puerto Sandino pipeline. That pipeline was blown up several times, not only once, or at least, it was intended to blow it up several times — three times. That is why they also attacked oil storage tanks, in order to completely cripple and paralyse the Nicaraguan economy, and make it impossible for the Nicaraguan Government to carry on their defensive war against the military régime by the *contras* supported by the CIA. That was the main purpose.

Q.: Apart from these air and naval attacks against Nicaragua by United States forces, were there any other measures by United States forces against Nicaragua?

A.: Yes, there were other measures against Nicaragua. I will mention some just as an example. For instance, at the end of 1983 two United States aircraft-carrier ships, the *S.S. Ranger* and the *S.S. Coral Sea*, along with the destroyer known as *New Jersey*, with escort ships were stationed just off the Nicaraguan coasts in an obvious threat of the use of military force. I have to say that this show of force occurred shortly before the 1983 offensive of the *contras* began.

On the other side, since the beginning of 1983, the United States has been carrying on continuous military exercises in Honduras, thus stationing there permanently several United States military units, especially intelligence units and supply and service units. Also, the United States made overflights with the most sophisticated surveillance plane that exists in the world up to now, the SR-71, nicknamed "the Blackbird". These overflights were made in such a way that the whole population could hear the sonic boom that this plane makes, creating a sense of fear and unrest among the population. But the most important action that the United States took against my country was the mining of the ports.

Q.: How extensive was the mining of Nicaragua's ports?

A.: The mining was very extensive. Except for minor ports that represented less than 2 per cent of the total commerce of Nicaragua, all commercial ports were mined.

Q.: What was the impact on Nicaragua of the mining of ports?

A.: Well, the mining of the ports first of all had a psychological impact on the whole population because it was tactically a naval blockade or a maritime blockade, not with ships but with mines; people had a feeling of being shut off from the world. But there were other direct effects of the mining of the ports; there were 12 vessels or fishing boats damaged by mines in different ports of Nicaragua, there was a Dutch vessel, a Soviet vessel, a Panamanian vessel, a Nicaraguan vessel, a Japanese vessel and an English vessel among those which received damage. There were also 14 people wounded and 2 people died. There were many vessels which did not arrive finally in port and left the merchandise they were bringing to Nicaragua in the ports of other countries, mainly in Costa Rica's Puntarenas from where we had to bring it to Nicaragua by truck at higher costs. Those were the main impacts of the mining of the ports.

Q.: Did the activities of the *contras* continue consistently throughout 1984 or were there variations in those activities?

A.: Well, the activities of the *contras* continued throughout 1984 but they started to decline towards the end of the year and into the first months of 1985. This was in effect a consequence of having used up the last funds they had received in December 1983 and that resulted in a shortage of supplies that determined a decrease in the military activities of the *contras*.

Q.: How do you know of the interaction between those two things, how could you tell that the absence of additional financial support from the United States resulted in a fall off of activity?

A.: Well, first the decrease in the level of military activity showed up in the daily report we have in my country, Nicaragua; but also from personal interviews and interception of *contras*' communications we know that there were many *contras* leaders who were complaining about the lack of supplies. We captured many *contras* very poorly equipped, uniforms worn out and with very few rounds of ammunition, etc., that make it evident that they were not receiving at least as much supplies as they used to receive years before, but there was even demoralization among the *contras* forces. And we know also that the main leaders told the commands, that is how they call the base member of the *contras* command, not to worry that they were sure that the United States would give the backing to them and that the help would come back again soon.

Q. To what extent did United States control over the *contras* forces continue during this period?

A. Yes, the United States continued holding the direction and control of all the *contras* forces during this period.

Q. Were there other changes in the United States methods of channelling assistance to the *contras* during this same period?

A. Yes, there were some changes. As official funds had not been approved, the United States used some civilian façade organizations to channel the funds to the *contras*; one of these organizations is the so-called civilian military assistance to which the two CIA mercenaries killed in Santa Clara in September 1984 belonged. But the United States also promoted fund-raising campaigns in the United States and very high government officers and President Reagan himself assisted in different activities related to this fund-raising campaign. I would say that these were the two main changes which made it possible for the *contras* to keep receiving some funds although in a lesser quantity, but they always could receive some support from the United States even during the period when the official aid was suspended.

Q. Earlier you referred to a decrease in activity by the *contras* forces early in 1985. Did there come a time when the *contras* increased the level of activity once again?

A. Yes, it happened in June this year, 1985. The *contras* launched another major offensive.

Q. In your opinion, did anything happen to prepare the way for this renewal of *contra* activity?

A. Once again, the pattern repeats itself. At the beginning of June there was approval by the United States Congress of $27 million more for the *contras*.

Q. And roughly how soon thereafter did the activities increase?

A. Within two weeks.

Q. What did the *contras* do when the activities increased? What was their new action and what was the objective of that action?

A. The new offensive of the *contras* is called *Plan Repunte*. This means a come-back plan. The main purpose of this plan was to infiltrate large *contra* military units more deeply within the territory, trying to operate near the main highway, where there is a greater density of population coming out of their traditional areas which are very sparsely populated and without any — or very few, or a very small — economic infrastructure, with the purpose of increasing the sabotage in areas where they could hit more important targets — for instance, in this area there is one of the most important electric generating plants of the country — but, also, to have an impact in areas which were for the whole country more sensitive politically in order to create an impression of political crisis and to portray the Government as incapable of holding control of the situation. This action was complementary to the economic boycott — the commercial embargo — established by the United States earlier this year. Those were the main purposes of this last come-back offensive, as they call it.

Q.: In connection with this new offensive, what was the extent of the operational dependence of the *contras* upon the United States?

A.: This new offensive again made evident the dependence of the *contras* on United States assistance. I have to say that they wouldn't have dared at all to be involved in this kind of operation without very strong and clear support from the United States. They decided this time to operate in areas where the military manœuvring capabilities of the Nicaraguan army had been increased. There are more roads, the terrain is a little bit less hilly, there is a small population which means that our counter-intelligence services and the Nicaraguan army can receive more information more rapidly from the population. So the *contras* — to come into that type of zone — to try to operate in those zones needed, indispensably, first of all assistance in the intelligence area: they need to receive, with accuracy, what the Nicaraguan army troops are doing, where they are, where are they going, how many they are, what plans they have — everything — in order for the *contras* to keep the initiative. Otherwise they would lose the initiative, the military initiative, very soon. On the other hand, this being a more favourable terrain for the Nicaraguan army operations, it was expected that combat was going to be more extended and more continuous. That means that ammunition and other military supplies would get used up very rapidly, so the *contras* also needed to have a very well-assured, steady flow of supplies during the course of these operations. Those are two things that again show how in this offensive they are dependent on the United States assistance to carry on their offensive.

Q.: Can you tell the Court what the impact of this offensive has been so far?

A.: The *contras* could not carry on with their plans and they were repelled to their traditional operational areas from the new areas they were trying to open. But in the course of the offensive there were three towns along important highways that were attacked by the *contras*. There were two bridges sabotaged also, on the Panamerican highway — around here — and where the combats were more intense there was also an increase in the number of casualties, both military and civilian. Some economic objectives, some tobacco houses and co-operative installations were also destroyed during the course of this attack and many civilians were murdured by the *contra* forces.

Q.: What have been the human costs to Nicaragua since the attacks began in December 1981?

A.: I have some figures here. Since the end of December 1981 to August 1985, there have been 3,886 people killed on the Nicaraguan side, on the Government side. I make this distinction because as I said before a good majority of the *contras* are forced recruited peasants and they also die in this war, and they are not included in this figure. And we had 4,731 wounded people, many of whom will remain crippled for the rest of their lives. And to the crippled and the wounded I would add that more than 40,000 people have been forced to abandon their houses because of the *contras* and they are fleeing from rural areas to the cities, and this is another human tragedy that is the direct effect of the military aggression.

Q.: In your opinion, what would happen if the United States were to terminate its support for the *contras*, for example, tomorrow, what in your opinion would be the result?

A.: Without any doubt the war would be over in a matter of a few months, not more than two or three months.

Q.: How can you be so certain?

A.: Well, because the *contras* are an artificial force, artificially set up by the United States, that exists only because it counts on United States direction, on United States training, on United States assistance, on United States weapons, on United States everything. Without that kind of support and direction the *contras* would simply disband, disorganized, and thus lose their military capacity in a very short time.

Professor **BROWNLIE**: Mr. President, this examination has been conducted under the rules and under your direction. I have now completed my examination, but of course, the witness remains at the disposal of the Court.

QUESTION PUT TO COMMANDER CARRIÓN BY THE PRESIDENT

The **PRESIDENT**: I have one question to ask, which is fresh in my memory. I would like to put it to the witness.

In answer to the question of the counsel, Professor Brownlie, the witness stated, on citing examples of direct attacks on Nicaragua, that in September 1983 there was a special team of CIA that blew up the pipeline with under-water high explosives. Now could this not be sabotage and therefore the responsibility could not be fixed on anyone?

Mr. CARRIÓN: This can be called sabotage, but as far as I can see that does not mean that the responsibility cannot be fixed on anyone, because it is known even through an internal CIA report, which in part was made public, that the CIA organized and executed that sabotage.

The **PRESIDENT**: Would you have any documentary proof of that fact?

Mr. CARRIÓN: The document is in the Memorial submitted by Nicaragua.

The Court rose at 1.10 p.m.

EIGHTEENTH PUBLIC SITTING (13 IX 85, 10 a.m.)

Present: [See sitting of 12 IX 85.]

QUESTIONS PUT TO COMMANDER CARRIÓN BY THE PRESIDENT, JUDGE LACHS, THE VICE-PRESIDENT AND JUDGES SCHWEBEL, SIR ROBERT JENNINGS AND COLLIARD

The **PRESIDENT**: I will finish my last question, and then request the other judges to ask questions.

The witness deposed before the Court yesterday that Argentine mercenaries, hired by the CIA, had given training to *contras* from 1982 to 1984. How many Argentinian mercenaries were operating with the *contras* and what proof was there that they were mercenaries and not volunteers motivated by ideological considerations, or sent by some organization in Argentina with no CIA link? Furthermore, which other countries are working with *contras* and in what numbers and in which capacity? What proof was there that they were paid by the CIA? Was a regular salary visualized or some lump-sum remuneration was paid and if so, how much per person? What was the strength of the *contras* operating in 1981 and today? How many CIA officers were directly involved and what proof was there of their identity as CIA?

Commander **CARRION**: I would like to answer the questions part by part.

The **PRESIDENT**: You would like to have a copy of these questions?

Commander **CARRION**: Please.

The **PRESIDENT**: If you would need time to collect the facts and figures, I would have no objection if you gave the answers in writing within one week. Would you prefer that, or would you like to answer?

Commander **CARRION**: Let me go over the questions.

The **PRESIDENT**: Yes, very good.

Commander **CARRION**: I would like to answer most of the questions now, but for some exact figures that are asked for here, I would like to give them later to the Court.

The **PRESIDENT**: You can do so.

Commander **CARRION**: I know that there were more than ten Argentinians operating with the *contras* from 1982 to the beginning of 1984. It is rather difficult to give the exact number, because they operated under false identities and they tried to hide their relationship with the *contras*. There are at least two names though that we could get. Those were the names of Santiago Villegas and Oswaldo Valitas. Those are the real names of Argentinians who used to be members of the army intelligence of Argentina. They were discharged from the army and after that they went to Central America to work and operate with the *contras*.

About the proof of their being hired by the CIA, of course we do not have a receipt signed by any one of them, that sort of thing just does not happen in these kinds of operations. Nevertheless, there are some fairly accurate and believable pieces of information in this sense. First of all, there was a video cassette that was made public by one of these Argentinians, called Hector Francis, where he stated that they received the money for paying all Argentinians working with the *contras* from the CIA — United States — and he said that the money was usually handed to them in Panama, to one of the Argentinian group in Panama, and he would take the money and go over and give it to the rest of them. On the other hand we have some inside information from people who are infiltrators into the *contra* groups and who have had many conversations with different Argentinian trainers and in those conversations on several occasions it came up that they were receiving a dollar payment which used to come from the United States. Those are two main sources of information for me to assert that the Argentinians were being paid by the CIA.

About other nationalities working with the *contras*, we have only identified American citizens and some people from Cuban origin about which we do not know exactly if they were American citizens or not. I have some specific information about that to give you.

Up to now from different sources, mainly prisoners' interviews, I am talking about prisoners who spent some time in Honduras training camps and hold certain medium-level responsibilities within the *contra* groups. From the public statements by some very important *contra* leaders in this case the most important public statement comes from a person whose name is Jose Efren Mondragon, who used to be the second in command of a regional command and this was publicly and directly acknowledged by the *contras*. From other sources we know that we have identified at least 11 United States citizens directly working with the *contras* in different matters. All 11 we have identified as being United States citizens and as being officers of the United States Government, the one known as Colonel Raymond used to be, until a few weeks ago, the chief of the team of Americans working with the *contras*.

In conversations with the prisoners we later caught, other people like Mondragon, they made it very clear that they were CIA officers. But not only that, some of these people had interviews with *contras* who were later captured or defected from the *contras* in the United States, and they presented themselves as being CIA representatives — in some cases they even talked in the name of the President of the United States. So we considered this and added it up with many other pieces of evidence, like the approving of funds for the CIA carrying on covert operations against Nicaragua as being very reasonable evidence that these people were effectively members of the CIA. We know there was at least one citizen of Cuban background and there is a document in this case signed by a very large group of *contra* leaders and which is a letter sent to the Embassy of the United States of America in Honduras, channelled through someone whose name is Colonel Raymond, asking the United States Ambassador to intervene so that this Cuban, who was assisting the *contras* on behalf of the United States Government, could remain for a longer period of time because he was helping them a lot. This document was handed to my Government by somebody who later defected from the *contras* and which I think is in the Nicaraguan Memorial presented to the Court, as illustrative proof.

Was a regular salary visualized or some lump-sum remuneration paid and if so how much per person? Does this refer to the *contras* themselves or to other nationalities working with the *contras*, in this question?

The PRESIDENT: The other nationalities.

Commander **CARRION** : Those who used to be regular CIA officers received a regular salary, but when it comes to agents, say the Argentine mercenaries who were not regular CIA officers but people hired outside the United States, outside the agency, to do some jobs for the agency, we could not call what they received a regular salary ; it was more like they were working on a contract basis. They received periodically some money which they would distribute among themselves, but within the Argentinian group it was clearly established how much each one was going to receive from the whole amount of money that the CIA handed to them. As to other CIA agents, like some of the people in the so-called political directory of the *contras'* main organization who happened to be CIA agents paid by the CIA, the money they received cannot be strictly called a salary, because it is not stable. The agency might give them directly some money or might put it in a bank so that when the agent has finished his work he can collect all the money he has received from the CIA which has been deposited in a bank, usually in the United States. People like Adolfo Calero who appears as being the chief leader of the *contra* organization has received money in this manner.

The **PRESIDENT** : May I just interrupt you to ask a question ? Would you then say that there was a possibility of a nationality other than the *contra* group to have joined because of ideological intensity and feeling rather than for the sake of money, and the money was merely pocket-money which was given for out-of-pocket expenses : that they were really fired by zeal because of ideological considerations, and therefore they were not war mercenaries ?

Commander **CARRION** : I would not have any doubt that some people might have come out of ideological convictions. Some people in different places of the world might feel that they have a right to go down to Central America and fight there. I think that this has happened in some cases, but by no way are they a majority. The majority of them are there because they are being paid salaries like the Argentinians were, because there was a *contra* and the CIA officers are there because that is their job : that is what they are paid for. Many Nicaraguans are there just because they are receiving a salary also. There has been public information about mercenaries of other nationalities recently — mercenaries from the United Kingdom, from France and the United States were captured in Costa Rica by Costa Rican authorities and they publicly declared that they had come because they were offered a salary, a regular payment, and also they were offered a life insurance for their relatives in case they got killed.

About the strength of the *contras* : at the end of 1983 there were between 1,000 and 1,500 people. Today there might be between 10,000 and 11,000, in the *contra* groups. And the last question about the CIA officers directly involved : I talked about that earlier when I said that we had identified at least 11 United States citizens who were working officially with the *contras* following instructions from their Government. That is all I have to say, Mr. President.

The **PRESIDENT** : Judge Lachs has a subsidiary question arising out of your reply, so I will give the floor to him.

Judge **LACHS** : You mentioned yesterday the figure of 7,000 in connection with the estimated force of the *contras*. So how do you arrive at these figures ?

Commander **CARRION** : Yesterday I referred, if I recall rightly, to the end of 1983. Now I am talking about the present figure, up to this moment.

The **PRESIDENT** : I now give the floor to the Vice-President.

Le **VICE-PRÉSIDENT** : Monsieur le Vice-Ministre, hier, vous vous êtes référé plusieurs fois à la date de décembre 1981 comme correspondant à un changement dans l'action des *contras* et dans l'assistance que ceux-ci recevaient des Etats-Unis. Cela signifie-t-il, selon vous, que les activités des Etats-Unis, faisant l'objet de la plainte du Nicaragua, auraient débuté en décembre 1981 ?

The **PRESIDENT** : Would you like to have a Spanish translation of this question ?

Commander **CARRION** : No, I think I understand. Well, the date of late December 1981 refers to the first time we have evidence of a direct CIA involvement with the *contras*. That does not mean that the CIA or other United States Government agencies were not having any activities against my Government prior to that date, but as far as we are concerned (as far as we can say with any certainty) the direct involvement with the armed groups (let us put it that way) began at the end of 1981. That is all I have to say.

The **PRESIDENT** : Judge Schwebel would like to put his question now.

Judge **SCHWEBEL** : Mr. President, I have three series of questions I should like to ask of Commander Carrión. Commander Carrión : Let us go back please to the days when the revolution against the Somoza Government was in progress but when the Somoza Government was still in power.

1. My first question is : would you be good enough briefly to describe the part you played in the revolution ?

Commander **CARRION** : I came to the FSLN, which is the leading political party in Nicaragua and the one which led the revolution, in 1972. From then on I worked as an organiser of the rank and file of the FSLN in the city of Managua mainly where I stayed most of my militant life as a member of the FSLN party. My organizational activities were related to forming FSLN groups within various sectors of the population ; we used to work with the industrial workers in the city of Managua and also within the vicinity. We did two types of thing — we helped them to set up their own organizations, for instance we helped them to organize the labour unions and most of the Nicaraguan workers at that time did not have any organized work because of the ferocious repression that Somoza maintained against the workers. You might say that some of the popular organizations that presently exist in Nicaragua were born before the revolution because they were organizations that dealt with the immediate interests of the people and simultaneously with that we tried to form (or I tried to form with other members of my party), FSLN groups where we could, to make our political programme known to more and more people all over the country so that they would support it. We also started organizing activities again against Somoza's Government ; this happened because there was no other way in Nicaragua at that time to change the government. The Somoza dictatorship lasted more than 45 years, from the father Somoza to sons who inherited political power from him and this military action against the Somoza National Guard and Somoza's dictatorship started to gain support from the people until an insurrection occurred first in September 1978 ; people took to the streets with every object that could be considered a weapon to fight the Somoza army. The insurrection was defeated at that time but then another insurrection came by June of 1979 when people took to the streets again in practically all cities and main rural areas of the country. By this time, Somoza's army could not resist ; Somoza fled the country and the whole structure fell apart, then the FSLN took over political power.

Q : Thank you. My second question is : during the revolution, but before the overthrow of the Somoza Government, did Sandinista forces receive assistance from foreign States ?

A. We received some support from other States.

Q. Did such support include any or all of the following:
Were arms supplied by any foreign States to the Sandinista forces?

A. We received a small amount of weapons from other States, but we also got weapons by taking them from the Somoza army and by buying from the clandestine weapons market.

Q. Did the Sandinista forces have the benefit of the use of bases in foreign territory, as for example Costa Rica?

A. Not exactly, the great majority of the Sandinista forces always remained within Nicaraguan territory and the revolutionary process came into existence through two insurrections from within the country and especially from within the cities, by the people who were there and had been fighting there for a long time. I can say, however, that we were not being put under pressure from the Government of Costa Rica, and we could stay there for some short periods of time.

Q. Did such foreign assistance include the training of Sandinista fighters?

A. A very small part of the people who took part in the revolution received some training offered by other States.

Q. Would you please name those States?

A. Yes, we received training in Cuba.

Q. Was there participation of foreign volunteer forces in the Sandinista forces or did such foreign soldiers, for example Panamanian soldiers, conduct allied operations with them?

A. There were some non-Nicaraguans with the FSLN forces.

Q. Thank you very much. May I now turn to my second series of questions and to the period since the revolution has been in power. You indicated Commander, your official responsibilities, particularly in Nicaragua's northern regions. I wish to ask:

Are you aware of any shipment of arms since the coming to power of the revolution in July 1979 from the territory of Nicaragua to insurgents in El Salvador?

A. My Government has never had a policy of sending arms to opposition forces in Central America. That does not mean that this did not happen, especially in the first years after the revolution in 1979 and 1980, weapons might have been carried through Nicaraguan territory, weapons that might have the Savadoran insurgents, as you said, as their final recipient. As a matter of fact in those first years there were several Nicaraguan citizens who went by themselves to El Salvador to join the Salvadoran revolutionaries there because they felt it was a fight like ours. Our fight was very recent and many people were willing to go down to El Salvador and help in their fight. But this was never an official policy and many of them could have been stopped before they left Nicaragua because most of the time they did this illegally. At one time we caught a "tica-bus" which is a commercial passenger bus line which travels through Central America. We caught this bus which had a double bottom and that double bottom contained arms, weapons, and those were going to El Salvador. So we suppose that there might have been other loads of arms going through Nicaragua that we did not catch.

Q. My final series of questions is this, and it complements the line of questioning of the President. You stated yesterday, in respect of the training of the *contras*, "In 1982 up to the beginning of 1984, the main part of the training was given by Argentine mercenaries hired by the CIA for which they received a monetary payment."

Nicaragua has introduced, as Annex F, Number 191, to its Memorial, as evidence, an article from the *Wall Street Journal* of 5 March 1985, which states the following:

> "The program got off to a bad start when the CIA turned to a surrogate, the right wing military dictatorship in Argentina, to organize and train the *Contras*. The Argentines already had a small training program for the *Contras* in Honduras and by working with them the U.S. shielded its own involvement. But the heavyhanded Argentine approach tainted the movement in the eyes of many Nicaraguans. The U.S. had few alternatives, since the CIA at the time didn't have any reliable paramilitary capability of its own."

The article in the *Wall Street Journal* further states that,

> "The Argentines also apparently tolerated a practice of killing prisoners . . . (To stop the killing, CIA-officers ordered in mid-1982 that all prisoners be brought back to base for interrogation.)"

The impression given by this evidence introduced by Nicaragua is

(*a*) that the first Government to assist the *contras* was not that of the United States but that of the then Government of Argentina;

(*b*) that the Argentine Government provided personnel from its armed forces to train the *contras*; and

(*c*) that the Argentine advisers tolerated a practice of killing prisoners which, when CIA advisers came on the scene, they endeavoured to stop.

Would you please comment on the foregoing impressions and also on whether a characterization of Argentine personnel, provided by the then existing Argentine Government for training of the *contras*, can correctly be characterized as "mercenaries"?

Commander **CARRION**: First of all, I believe that the newspaper article you have just read expresses the writer's point of view. You did not say if those assertions were direct quotations from CIA officers or CIA chiefs, so what I think the article makes evident is that there was an involvement of Argentinians, that there was an involvement of the United States in co-operation — in close relationships — with some Argentinian people. Whenever we turned to the Argentinian Government to ask them about these people, they presented us with documents of their formal discharge from the army — the Argentinian army. So, we are not in a position to assert that in the participation of these Argentinian ex-military it was a governmental decision on the part of the Argentinian Government at that time. We know that some talks were held by United States officers — among some United States officers — and some military of the Argentinian army. That is as far as we know. This means that the first foreign involvement with the *contras* already relied upon the participation of the United States of America and it is very clear that they took the initiative to involve people from other nationalities — that is in reply to your question as to whether another government was the first to get involved with the *contras*.

Would you please repeat the other two questions?

Judge **SCHWEBEL**: My second impression, on which I invited your comment, was that the Argentine Government had provided personnel from its armed forces to train the *contras*; I think actually you have responded to that. The third was that, according to this article introduced in an annex to the Nicaraguan Memorial, Argentine advisers tolerated the practice of killing prisoners which the CIA endeavoured to stop.

Commander **CARRION**: I think that it was very clear yesterday how a CIA document, which is the *Psychological Operations in Guerrilla Warfare* manual, clearly instructs the *contras* in killing some civilian people. They list some of them and leave it open with an etcetera at the end of the list for the *contras* to decide who would be victims of these murders, so I believe that in the essence of the terrorist tactics of the *contras* there was not any variation when the Argentinians were the major trainers but not the sole trainers and when the CIA directly took over the training. I have to say that from the beginning, from 1981 up to now, the CIA has held firmly in its hand the direction and control of all *contra* operations. So they have been directly involved at all stages of the organizational process of the *contras* and they directly hold responsibility for things the *contras* are doing.

Judge **SCHWEBEL**: I have completed my questions. I think you earlier responded to my last one about whether the Argentine officers could correctly be characterized as mercenaries.

The **PRESIDENT**: May I now have Sir Robert Jennings please?

Judge Sir Robert **JENNINGS**: One very short question on the minings of the ports. Presumably after the mining it was necessary to sweep the mines or deal with the mines in some other way and I remember at the time there was even talk of an international operation to do that. In the event, was the Nicaraguan Government able to deal with the mines from its own resources and can you tell us roughly what time elapsed between the discovery of the mines and the restoration of the ports to normal use by shipping?

Commander **CARRION**: Nicaragua could not deal with the mines with its own resources. We do not have a mine-searching ship of any kind. We even had to try to sweep the mines away with a fishing boat and a net hanging down and going over the channel in order to try to sweep them away. As you may suppose this was a very ineffective way of dealing with underwater mines that were the ones that the CIA had put there.

In relation to your second question, we never discovered a mine before it exploded. We did not have the means to discover them, so during the whole period when our ports were mined, there was an abnormal situation in Nicaraguan ports. Every vessel that came to our ports could be hit at any moment by an underwater mine so we could talk about a permanent state of abnormality for several months during which our ports were mined.

Judge Sir Robert **JENNINGS**: Still, could you tell us roughly how long — days, weeks — this situation obtained, because presumably this is all right now. Presumably the mines are not operating at the moment and I would like to know about how long this situation that you have just described lasted?

Commander **CARRION**: When a mine exploded normal operations in the port would be stopped for between two and three days and then resume, not in a normal way, but trying to look normal. Concerning how long a period the mines were being put in our ports — it was approximately two months.

The **PRESIDENT**: May I now ask Mr. Colliard to put his question please.

M. **COLLIARD**: Monsieur le Vice-Ministre, j'aurais trois questions à vous poser. Peut-être, pour certaines d'entre elles, ne pourrez-vous pas répondre immédiatement et, avec la permission du Président, je suis prêt à recevoir vos réponses la semaine prochaine, dans un délai que pourrait fixer le Président.

Première question. Des indications ont-elles été fournies par l'examen des mines repêchées concernant leur fabrication et leur provenance?

Commander **CARRION**: As I said before, the Nicaraguan Government had no possibility of discovering the mines before they exploded, much less capturing them. So we did not actually see a mine, we did not have any in our hands and in any case the origin of the manufacture of the weapons or other military explosive devices that are used by intelligence agencies does not mean anything because the first thing that an intelligence agency would do is to acquire the equipment in some place other than in its own country. This is why it is very significant that in the case of Nicaragua the CIA has not taken any care, in many cases, to cover up the origin of most of the equipment they used.

M. COLLIARD: La seconde question est la suivante. Hier, parlant de navire endommagé par des mines, vous avez indiqué quatorze personnes blessées et deux tuées. Pouvez-vous préciser à bord de quel navire ces accidents ont eu lieu?

Commander **CARRION**: Yes, I have that information here. The two killed were Nicaraguan and it happened when a mine blew up a fishing boat *Pesaca No. 22*. Also, three people were wounded at that time in that same boat. From the Soviet vessel five members of the crew were wounded, from the Panamanian vessel there were three crew members wounded and there were three Nicaraguans wounded in another ship, which makes up a total of 14 wounded people as I mentioned yesterday.

M. COLLIARD: Enfin, troisième question. S'agissant de navires étrangers, autres que navires du Nicaragua, pourrait-on avoir le nom des compagnies auxquelles appartenaient les navires endommagés. La réponse peut être différée parce que vous n'avez peut-être pas les éléments ici même.

Commander **CARRION**: I do not have that information with me. I would have to ask for it so I could not answer immediately.

The **PRESIDENT**: Would you then be able to answer in about a week's time?

Commander **CARRION**: In a week's time? Yes, I could.

The **PRESIDENT**: Very well, then do so please.

The Court adjourned from 11.25 a.m. to 11.54 a.m.

The **PRESIDENT**: There is one more question for the first witness, if Commander Carrión is still available.

Mr. **ARGÜELLO GOMEZ**: Mr. President, Commander Carrión has already left. When we were told that he might be needed again he had already left the premises, but certainly if the Registry would like to locate him, I should imagine that he has returned to his hotel. Otherwise he could be called after the witness we are going to introduce next, by which time we could probably have him back here.

The **PRESIDENT**: Very well.

Mr. **ARGÜELLO GÓMEZ**: In that case, Mr. President, I request the Court to call our next witness, Mr. David MacMichael, who will be examined by Professor Chayes.

The **PRESIDENT**: I would first ask the Judge to put his question, to get it on record, and when the Commander comes he can answer it. If not, he will answer it subsequently. I will summon the second witness after Judge Schwebel has taken the floor.

Judge **SCHWEBEL**: May I submit, Mr. President, that since it is believed that Commander Carrión can return, it would save the time of the Court if I simply stated the question when he appears.

EVIDENCE OF MR. MacMICHAEL

WITNESS CALLED BY THE GOVERNMENT OF NICARAGUA

Professor CHAYES: Before the witness makes his solemn declaration I would like to make a statement for him and for the Court. Mr. MacMichael at the outset and before you have made your solemn declaration, I want to admonish you and assure the Court that in the testimony you are about to give you will not make any unauthorized disclosure of information that is classified under United States security procedures, nor disclose any information in violation of any laws or regulations of the United States or of the terms of any employment contract you may have with any agency of the United States Government. If I ask you a question that you cannot answer truthfully under those limitations, you should simply say "I cannot answer that question". Do you understand that?

Mr. MacMICHAEL: Yes, I do.

Professor CHAYES: And do you agree to comply with those limitations to the best of your knowledge and ability?

Mr. MacMICHAEL: I do agree.

Professor CHAYES: Would you now make the solemn declaration.

Mr. MacMICHAEL: I solemnly declare, upon my honour and conscience, that I will speak the truth, the whole truth and nothing but the truth.

Q.: Please state your full name and current address for the record.

A.: My name is David MacMichael. My current address is 11442 Orchard Lane, Reston, Virginia, United States.

Q.: When and where were you born?

A.: I was born on 5 June 1928 in Albany, New York.

Q.: And what is your current employment?

A.: Currently I am a senior associate with the Council on Hemispheric Affairs in Washington, D.C.

Q.: I am now going to develop in some detail those aspects of Mr. MacMichael's background and experience that bear on his qualifications as an expert witness in the field of intelligence analysis, guerrilla warfare and counter-insurgency, with specific reference to Latin America and Central America.

Mr. MacMichael, please summarize your educational background.

A.: I hold a Bachelor's Degree in Liberal Arts from Hampden-Sidney College in Virginia and a Master's Degree and a Doctor of Philosophy in History from the University of Oregon.

Q.: Could you summarize your military experience, please?

A.: I spent almost ten years on regular service in the United States Marine Corps, first as a private from 1946 to 1948, and I returned to the Service in 1952 commissioned as a second-lieutenant in the United States Marine Corps and served thereafter until late 1959, when I resigned. I was an infantry officer: I performed duties typically in amphibious reconnaissance and infantry assignments, and I was wounded in action in Korea.

Q.: What did you do after you finished your graduate studies?

A.: I taught history at the Dominican College of San Raphael in California and at the University of Oregon.

Q.: What course did you teach?

A.: Primarily I taught Latin American history and courses in American history.

Q.: Were you at that time already specializing to some degree in Latin American affairs?

A.: Yes, I was. My dissertation topic dealt with United States relations with the Dominican Republic and on Caribbean diplomacy.

Q.: So what did you do after 1965?

A.: In 1965 I was invited to join the Stanford Research Institute, now known as SRI International, in Menlo Park, California.

Q.: What kind of organization was it?

A.: Stanford Research Institute, or SRI International, is a large independent contract research organization; it is one of the largest institutions of its type in the United States. It does contract research for a variety of governmental and private clients in a whole range of fields from hard science to social science studies.

Q.: And what kinds of contracts did you work on?

A.: I was employed originally to work on Department of Defense contracts, first in Central and South America.

Q.: Could you describe in general the kind of study that you were working on? By that I mean the subject-matter, the kinds of data that you developed, and so on.

A.: The initial study that I dealt with was one contracted with the Advanced Research Projects Agency of the Department of Defense of the United States. It was directed at the military assistance programme in Latin America which at that time was being revised from previous concentration on external defence towards internal security matters and it was one of a series of studies designed to assist the Department of Defense in reshaping its military assistance programmes on that basis.

Q.: Can you say what countries your study dealt with?

A.: Yes, the two countries which we studied were Honduras and Peru.

Q.: And how did you go about this study?

A.: A team was formed at SRI consisting of myself, a retired United States Army colonel who was chief of the team, and a former relatively high-ranking Central Intelligence Agency official who was then an employee of SRI and some supporting personnel. We did some background within the area dealing with outside consultants, experts from the Stanford community. We travelled to Panama to the Southern Command Headquarters, where we conferred with the officers in charge of the military assistance programme, examined their files, travelled to the countries in question, dealt there with United States advisory personnel, with local military and internal security personnel, discussing the general problem, and on the basis of several months of this activity produced a report.

Q.: I have been informed that both of us are speaking a little too fast for the interpreters to follow so let us both try to do better on the subsequent questions. To resume our consideration of these studies, in the course of this work did you have access to classified information?

A.: Yes, I did.

Q.: And to what degree of classification?

A.: At that time I had clearance for secret material.

Q.: Sir, you said that at the end of the study your team prepared a written report; when was that?

A.: That was in February 1966.

Q.: To whom was that report transmitted?

A.: To the contractor, the Advanced Research Projects Agency.

Q.: Did the report receive other distribution, so far as you know, within the Defense Department or other government departments and agencies?

A.: Yes, it was rather widely distributed; we received comments from a number of United States government agencies on that report.

Q.: Was the report itself classified?

A.: Yes, it was.

Q.: As I said before, I do not want to ask you to reveal classified information, but within that limitation could you summarize in any way the recommendations of the report?

A.: Yes, I think that in general the report provided the Department of Defense with what we thought were the critical features of the internal security situation within each country, addressed ourselves to the posture and organization of the internal security forces of each country and in light of the situation as we had defined it, made certain recommendations as to procedures the Department of Defense might follow in its military assistance programmes thereafter.

Q.: Now sometime later you joined the Office of the Special Assistant for counter-insurgency in the United States Mission in Bangkok in Thailand. Could you please state the circumstances under which that occurred?

A.: Yes. Following the completion of the study we have discussed, I was invited to join the SRI (the Stanford Research Team) that was then working under contract, again with the Advanced Research Projects Agency of the Department of Defense, in Bangkok, Thailand. My initial tasks there were to conduct studies on the Thai-Malayan border with a view to determining whether certain internal security devices and programmes that had been used by the United Kingdom in Malaysia — a closely related area — would be suitable for implementation in that area. While I was engaged in that, after having been in Thailand for some months the United States Government, which was at that time funding and supporting a great number of internal security activities within Thailand and assistance to the Royal Thai Government being carried out by a large number of United States Government agencies, found it necessary better to co-ordinate those activities and established within the United States Embassy an office to do that which was called the Special Assistant for counter-insurgency. A senior United States intelligence officer was assigned to head that office, and as I mentioned earlier in my work on Central and South America our team had included a former CIA officer who recommended me to this Special Assistant as someone who could give him qualified assistance in that office and he asked me to join the office; the SRI contract with the Department of Defense was arranged so that my services could be employed in that office within the United States Embassy.

Q.: When you joined that office was your status as employee of the SRI or of the United States Government?

A.: I remained an employee of SRI.

Q.: What was your relationship to the office?

A.: I was one of about half a dozen staff members in the office, this included representatives from the Agency for International Development, from the Intelligence Agency, from the United States Information Agency, from the Department of Defense — with a military representative as well — and our task as a staff was to assist the Special Assistant in, as I said, co-ordinating the activities of these various United States Government Agencies.

Q.: And you were a full-time member of that staff?

A.: That was my full-time employment for almost two years, yes.

Q.: Now could you describe some of the subjects of study that you worked on when you were attached to the staff of that office?

A.: One of the principal tasks, aside from the administrative functions of co-ordination of the activities of other agencies, was to study the nature of the internal security situation within Thailand at that time — a rather vexed question if I may say so — to determine whether these several programmes of the United States Government were being most effective and directed towards the actual situation.

Q.: And did you concentrate your study in any particular areas of Thailand?

A.: The principal area of concern at that time was the northeastern part of Thailand where the largest and supposedly most critical of the several insurgencies was then raging.

Q.: And in relation to that insurgency in northeast Thailand what parts of the counter-insurgency programme were you specifically concerned with?

A.: The specific concern assigned to me was the extent to which this insurgency was purely indigenous and the extent to which it was being directed and supported from outside the country. This obviously was a matter of concern in terms of how one organized a system for dealing with insurgency.

Q.: And how did you obtain the data for that study?

A.: This involved a study of the existing intelligence files on the subject, consultations with both United States Government and Royal Thai Government personnel who were dealing with the subject; field trips, organization of certain technical aspects, that is to monitor and report on, for example, alleged air intrusion into Thailand and general matters of that type.

Q.: And did this information include classified materials?

A.: Almost all the material was classified, yes.

Q.: And, what were you seeking to determine — if you can describe that in a few sentences?

A.: To ascertain the extent to which the problem was an indigenous one or one that relied essentially on import of arms and trained personnel from outside the country; in this case the concern was with North Vietnam.

Q.: And for that purpose did you have to identify and define the supply network and logistic system of the insurgents?

A.: Yes, we attempted to do that.

Q.: Now, to whom did you report?

A.: Well, the report was given directly to my superior, the Special Assistant for counter-insurgency.

Q.: And was that report classified?

A.: Yes, it was.

Q.: Did the reports circulate back in Washington?

A.: Yes, it formed a basis for a very long cable, which was transmitted to the

Secretary of State, making certain recommendations about the nature of the northeastern insurgency and the manner in which the United States should organize its programmes of support for the Royal Thai Government.

Q: Having regard to the restriction already mentioned about revealing classified information, could you summarize the conclusions of this final report?

A: With regard to its central matter, the basic conclusion was that this was very largely an indigenous matter that received some, but not critical, support in the form of training and supplies from outside the country.

Q: Did your recommendations or analysis become the basis for, or influence, United States policy in this area?

A: I believe that they did.

Q: Now is there any other particular area in Thailand that became a subject of your concern?

A: I carried out several studies for which I was directly responsible to that office and later to the Ambassador, dealing with, once again, the Thai-Malaysian border area; I also conducted a study for the Ambassador of the United States programme for providing certain types of aircraft to the Thai security forces, with a view to their suitability, or the suitability of the programme, for the overall effort. I also assisted SRI again in one of its major projects, which was a surveillance system along the Mekong River.

Q: Looking for a moment to the Thai-Malaysian border insurgency problem, could you describe that work more fully?

A: Well, to a certain extent, as I have already explained, an early project for SRI there was to examine very closely — and this was a very detailed study, it attempted to find the supply and support system for the nearly 2,000 guerrillas, these were people essentially left over from the so-called Malayan emergency — to determine how they supported themselves in the jungle areas and to assist the Royal Thai Government and co-operating Malaysian forces in devising a system to disrupt and interrupt that supply system. I also later carried out more general studies with regard to the overall social and economic system in which these people existed.

Q: Now you said that after you concluded your work in the office of the Special Assistant for counter-insurgency, you did some work directly for the Ambassador. Who was the Ambassador at that time — that is the United States Ambassador, I assume?

A: At that time it was Mr. Leonard Unger.

Q: And in this capacity, were you still paid by the SRI?

A: Yes, I was.

Q: You have already given us the main subjects of those studies, perhaps you could recapitulate very briefly?

A: The two — as I say I performed at his direction — included the examination of the social and economic system or circumstances, conditions along the Thai-Malaysian border and the second, which was more highly focussed because the question had become an important one, had to do with the United States programme for providing aircraft for use in Thai counter-insurgent operations.

Q: When did you leave Thailand?

A: I left in August of 1969.

Q: And did you continue for SRI?

A. Yes, I did, until the end of 1976.

Q. What kinds of projects did you work on during that period?

A. On my return to the United States I began to work on projects; I did several for the law enforcement assistance administration of the Justice Department and then joined a group that was under contract to the then Office of Education, later the Department of Education in the United States Government.

Q. Was there any particular reason why you stopped working on defence-related studies at this time?

A. In the years around 1970 and after that the interests of the United States Government, which had been the primary funder for the studies I had performed previously, began to shift away from the type of counter-insurgency and defence-related study. To put it frankly, there were fewer contracts coming to SRI in that field and in order to remain employed I shifted over to other work.

Q. You left SRI you said in 1976?

A. Yes, I did.

Q. What did you do then?

A. I went to work as a private consultant.

Q. When you were working as a private consultant, did you work on any projects for the United States Government in the political, military area?

A. Yes, I did.

Q. Could you describe the project that you worked on?

A. That particular project I cannot describe.

Q. All right. Now, after some time as a private consultant, you were employed by the CIA — is that correct?

A. That is correct.

Q. State the dates during which you were so employed.

A. I went on active duty with the Central Intelligence Agency on 6 March 1981 and left them on — I believe the date was 3 April 1983.

Q. Could you state the nature of the employment relationship between you and the Agency?

A. Yes, I entered as a full-time, fully integrated employee of the Central Intelligence Agency. I was cleared in the manner of a full-time employee, I went through the same security procedures, the same required polygraph examinations, was integrated into the retirement system, but I was in on a two-year contract.

Q. Tell us the exact title of your position with the Agency.

A. I was designated a Senior Estimates Officer with the Analytic Group of the National Intelligence Council.

Q. I would like to break down that impressive title a little bit. First, what is the National Intelligence Council, and what are its functions?

A. The National Intelligence Council is the senior staff of the Central Intelligence Agency, it works directly under and in support of the Director, it is not a part of the two main divisions of the Central Intelligence Agency. It is composed of a group of senior officials who are designated as National Intelligence officers, who work under a chairman of the National Intelligence Council. Each one of the National Intelligence officers has assigned to him an assistant National Intelligence officer. The main function of the National Intelligence Council is to serve as a senior advisory body to the Director of Intelligence, its most critical function is defined as the warning function — that is, it is supposed to report immediately to the Director any developments globally that could seriously and adversely affect the interests of the United States. The National Intelligence officers in their individual capacity have responsibility for regional or functional areas within the world — that is to say, there will be a National Intelligence officer, say, for Latin American affairs. Functionally there would be a National Intelligence officer for world economic affairs. In their individual capacities these National Intelligence officers are charged with co-ordinating the activities, in their areas of responsibility, of the whole intelligence community of the United States, that is, all the agencies which have intelligence responsibilities in these areas.

Q. Are all of these members of the National Intelligence Council CIA officers?

A. No. They are drawn from within the intelligence community. I should mention there is also a senior advisory group of retired and distinguished officials attached to this, who are brought back to serve as a more or less in-house Board of Directors.

Q. Can you name any of these National Intelligence officers?

A. No. I cannot name anyone with whom I worked in the Central Intelligence Agency.

Q. What are the principal reports and analyses that the Council is responsible for?

A. The Council is responsible for the preparation of inter-agency intelligence documents and these have three principal forms, one is entitled the "National Intelligence Estimate", these are broad general purpose documents prepared either periodically or at the pleasure and direction of the Director of Intelligence to serve as the basic information papers on a region, or a country, or a functional area, for the use of decision-makers within the United States Government, within the context and with relation to the United States policy in those areas; the second type of document prepared, for which this group is responsible, are special National Intelligence Estimates, which are similar in purpose and form but generally shorter and directed towards a more immediate problem or to a region which has suddenly become of more interest and concern to the United States.

Q. Are those special National Intelligence Estimates performed by special commissions so to speak?

A. These estimates are essentially drawn up in the following manner: the National Intelligence officer responsible calls a meeting of interested involved agencies within the intelligence community to determine the general focus and scope of such a special estimate or a National Intelligence Estimate, there will be general agreement on terms of reference for the paper and usually a drafter will be selected. At a later meeting the drafter will present the terms of reference, the general scope and outline of the study, a schedule will be decided upon, the drafter will set to work and meet periodically with representatives of the interested agencies and eventually a paper is produced.

Q. We have been talking so far about the National Intelligence Council. I now want to turn to the Analytic Group. That is the Group of which you were a member. What is the nature and function of that Group, who are its members, how large is it, please provide information of that kind?

A. The Analytic Group was formed around 1979 or 1980 to meet a long-felt need of the National Intelligence Council to have an immediate body of qualified persons responsible to it, to conduct analyses, to advise it and to serve as drafters of estimates and other inter-agency papers. The Group was composed of members drawn from throughout the intelligence community and a few people like myself taken from academia, research institutions and so forth from outside. One of the basic principles upon which this Group was founded was to provide the Intelligence Council with fresh new points, not tied to any demands of any specific agency. Its members only serve with the Council for two years and then they returned to where they had come from.

Q. What are the duties of a Senior Estimates Officer in the Analytic Group?

A. The Estimates Officers — there is no real rank or gradation. I may say as a Senior Estimates Officer one was responsible for carrying out studies and analyses, drafting papers at the direction of the National Intelligence Council. Members were also expected to carry out independent research tests of their own and report on these to the Chairman of the National Intelligence Council.

Q. In your capacity as Senior Estimates Officer did you attend regularly scheduled meetings of boards or committees within the agency or constituted on an inter-agency basis?

A. Yes, I did. We had regular weekly meetings as part of the National Intelligence Council in a body with the Chairman. The Analytic Group met separately with the Chairman on a weekly basis. As a representative of the Analytic Group I attended meetings of interest to the Group and myself personally throughout the Central Intelligence Agency and other Agencies as well.

Q. To whom did you report?

A. We had a National Intelligence Officer at large, a senior official who was generally responsible for the functioning of our Group. Technically we reported directly to the Chairman of the National Intelligence Council.

Q. When you were called upon to prepare or review an intelligence paper what did you do to prepare yourself for that task?

A. The hope was that one was generally qualified to do this initially, but immediately the process of what was called reading into the problem began, one would examine the existing files on the topic, would confer with the analyst and other persons within the intelligence community who had special knowledge of that problem, and would, through the system, call up current intelligence material to gain further knowledge on it.

Q. And did this involve the review of classified intelligence information?

A. Yes, it did.

Q. Can you tell us the precise type of clearance that you had at this time?

A. I had a top secret clearance with an additional type of clearance which enabled me to go out of the boundaries of what is known as "special compartmented intelligence". Due to the global nature of the duties of the National Intelligence Council its members were not confined to a narrow need to know an area in one special function or region.

Q. And is top secret the highest form of clearance category in the United States classification system?

A. Formally[1], yes.

Q. Now I want to take you back to the time when you joined the agency in 1981 and I want to ask you whether, as a Senior Estimates Officer with the Analytic Group of the National Intelligence Council, your work was concentrated in any one area?

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[1] See p. 58, *infra*. [*Note by the Registry.*]

A. Technically, I and the other members of the group were in general support to the National Intelligence Council. In practice, we found ourselves as individual members concentrating on one area in which we had more expertise. In my case, I spent the vast majority of my time working on inter-American, that is western hemisphere, affairs.

Q. Now, as part of your official duties at that time in 1981, were you advised of a plan prepared for submission to the President of the United States calling for covert activities against Nicaragua?

A. Yes, I was.

Q. Can you tell us when and how you were advised of the plan?

A. The plan was discussed at a meeeting of the Latin American Affairs Office which I attended in my capacity as a member of the analytic group early in the Fall of 1981.

Q. When you say Latin American Affairs Office, is that the Latin American Affairs Office of the Central Intelligence Agency?

A. Yes, it is.

Q. Do you know if the President ultimately approved this plan?

A. Yes, he did.

Q. Was that the plan submitted to the House and Senate Intelligence Committees in November 1981?

A. Yes, it was.

Q. You say you first heard of this plan at a meeting in the Latin American Affairs Office of the Agency in the Fall of 1981, could you tell us generally the outline of the plan as discussed in that meeting?

A. Well, as discussed, the general premise of the plan was that Nicaragua was considered a menace to the security of the Central American region and that a covert force of approximately 1,500 men was to be organized to carry out military and paramilitary actions in Nicaragua.

Q. Now at that meeting, was the possible response of the Government of Nicaragua to these military and paramilitary activities considered?

A. Yes, it was.

Q. Could you say what responses were anticipated?

A. In general the appreciation at that time was that the Nicaraguan Government leadership was immature, impulsive, possessed, in the phrase used, of a "guerrilla" mentality and it was presumed that in response to the actions of this covert force that in all likelihood the Nicaraguan Government would engage in hot pursuit of this covert paramilitary force, across international boundaries within Central America, it was assumed that in response to the state of emergency generated by these attacks that the Nicaraguan Government would clamp down and eliminate civil liberties, to exile or confine its political opponents, and finally that diplomatic relations between the United States and Nicaragua probably would be exacerbated and that United States diplomatic personnel within Nicaragua could expect to be harassed or otherwise restricted or affected.

Q. Now, what was the attitude within this Committee to these anticipated responses?

A. I do not know exactly how to respond in terms of attitude. Certainly this was put forward as a programme which would destabilize or certainly reduce the presumed menace that the Nicaraguan Government presented to the region.

Q. Why, for example, was it expected that if Nicaragua took actions in hot pursuit of this paramilitary force across international boundaries, why was that a development that the group looked forward to?

A. It would serve to demonstrate what was believed, which was that the Nicaraguan Government was inherently aggressive and a danger to its neighbours in the region and that such crossing of territorial boundaries would demonstrate this and possibly allow for the use of sanctions or other actions under the Organization of American States' Charter.

Q. And why did the group anticipate or look forward to the further repressive activities by the Nicaraguan Government?

A. It was assumed that the Nicaraguan Government was inherently totalitarian and repressive and that it had rather successfully portrayed itself as an open and democratic society and thus gained a good deal of support in world public opinion and that by causing its true nature as a repressive and totalitarian government to be displayed it would lose this support.

Q. Why did they look forward to the possibility that Nicaragua would take harsh action against United States diplomats?

A. I think the purpose here was to be able to demonstrate the essential hostility of the Nicaraguan Government toward the United States and thus help to justify in United States public opinion actions which the United States might take against Nicaragua.

Q. What would you say was the overall purpose of the plan?

The PRESIDENT: Would this be a convenient place to stop and have Commander Carrion, the first witness, answer the question posed to him earlier?

Professor CHAYES: Yes, this would be perfectly all right. I think Mr. MacMichael ought to retire at this point so that he does not hear Commander Carrion's answer, but this would be a perfectly appropriate time to do that.

QUESTIONS PUT TO COMMANDER CARRION BY JUDGE SCHWEBEL

Judge SCHWEBEL : Commander, I regret the inconvenience of your being recalled. I have two questions following from your earlier testimony.

First, what would you estimate was approximately the total of the armed strength of the Sandinista fighting forces by about June 1979 shortly before Somoza's collapse ? I ask for just a rough estimate, not a precise figure.

Commander CARRION : The Sandinista forces by the end of 1979 — the Sandinista armed forces — were somewhere in between 3,000 and 4,000 armed men. There was a much greater number of Sandinista sympathizers, but the armed men were around 3,000 or a little bit more.

Q : Thank you. My second question is this : you stated in response to the questions I put to you earlier that the amount of arms furnished by foreign States to Sandinista forces was small — that I believe is the word you used, small — and you have responded to my question about the use of foreign bases by Sandinista forces in terms which I believe gave the impression that such foreign basing was not very important to the cause of the Sandinista revolution, if I understood you correctly. Is my recollection of your answers correct ?

A : Yes, but I think that concerning the arms question I said that a part of the arms were provided by some other States.

Q : Yes. Now, if you will permit me and if the Court will permit me, I am going to read a few excerpts from a book, *Nicaraguan Revolution in the Family*, by Shirley Christian, a Pulitzer prize-winning journalist, now a reporter for *The New York Times*. It is a detailed eye-witness account of the fall of Somoza, among other things.

First quotation :

> ". . . the rebel supply-line was growing and becoming more efficient. From December 1978 to July 1979 there were at least 60 flights into Costa Rica with arms, ammunition and other war supplies. This was confirmed . . . by the subsequent investigation conducted by the Costa Rican National Assembly. Except for the flights that brought the Venezuelan offering and one carried items supplied by Panama, . . . all the flights carried material supplied by Cuba . . ." (At p. 90.)

Second quotation :

> "In addition to the preparations in Costa Rica, a smaller number of Sandinistas was organizing and arming in Honduras in early 1979 to push into Nicaragua from the north." (At p. 91.)

Third quotation :

> "In Costa Rica an estimated 1,500 men and women were preparing for an all-out invasion of their homeland."

Fourth quotation :

> "As the time for the southern offensive, planned for late May, grew close,

> it was decided to eliminate the Panamanian town . . . as the transshipment point for weapons and ammunition. Instead, everything would be flown direct from Cuba to Costa Rica . . ." (At p. 95.)

Fifth quotation:

> "To make the flights direct from Cuba to Costa Rica, Eden Pastora struck a deal with Costa Rica . . . The airport manager . . . calculated there were 23 flights to and from Cuba between then and the end of the war in mid-July . . . Costa Rican National Assembly investigators later estimated that at least one million pounds of war material entered Costa Rica from Cuba during that period of six to eight weeks, a figure that did not include what had been shipped earlier . . ." (At p. 96.)

Now, in the light of this data, Commander, would you please amplify your earlier statement or inference that provision of arms by foreign States to Sandinista forces was "small", and that the reliance on foreign bases of more than 1,500 of the 3,000 or 4,000 of the Sandinista armed forces' bases in Costa Rica and Honduras was not important?

A. Yes. I said that weapons received at that time from other States were a part of the total weapons the Sandinistas used at that time. I would like to remind the Court that the Sandinistas were fighting against Somoza since 1963 — I mean involved in military action against Somoza's dictatorship — and the quotes you just read from that book refer to some assistance received beginning, I believe, at the end of 1978. I can assure you that during all that time practically all weapons that the Sandinistas used and a part of the weapons that the Sandinistas used after the end of 1978 were bought in the clandestine weapons market. I was personally involved in purchasing $500,000 worth of arms from European suppliers. I know that there were other purchases like that, and we also received weapons and assistance from other States, as it is put there. I am not in a position to confirm the figures mentioned by Miss Christian in the book, because I was not, except for a very short period of time, in Costa Rica or Honduras at that time.

Secondly, I believe that there were not somewhere close to 1,200, as you said?

Q. Miss Christian says there were 1,500 Sandinistas in Costa Rica.

A. I do not believe the figure was so large. As far as I know, it was somewhere around 800 to 1,000 men and women, and I am not sure if all of them were directly involved in combat actions. Nevertheless this does not affect the judgment I made and the fact that people coming from outside had a very minor effect on the outcome of the war. I would like to mention that in a period of a few days, that is three to four days, the Sandinistas forces were holding combat in practically every major city of the country and that could only be achieved by forces that were already in the cities or very near the cities, and I am talking first of all about the city of Managua, which is the capital, Leon, Masaya, Juigalpa, Matagalpa, Esteli, which I believe were the main cities at that moment attacked by Sandinista forces, and the forces attacking these cities constituted the greatest part of the Sandinista forces acting at that time. But not only that, also the Sandinista forces acting within the cities, the armed forces, were not so large, because we had a shortage of weapons. But what made it possible for them to achieve a victory was the fact that practically the great majority of the population in different ways insurrected to support the relatively small armed

Sandinista groups that were acting within the cities. This is clearly, and this is a historical fact, by large the most important factor towards the overthrowing of the Somoza dictatorship. That is all I have to say.

The Court rose at 1 p.m.

NINETEENTH PUBLIC SITTING (16 IX 85, 3 p.m.)

Present: [See sitting of 12 IX 85, Judge Lachs absent.]

EVIDENCE OF MR. MacMICHAEL *(cont.)*

The **PRESIDENT**: Before proceeding with the hearing I have to announce that Judge Lachs, for reasons which he has disclosed to me, is unable to be present this afternoon.

You may now resume the testimony of Mr. MacMichael, the second witness. I give the floor to the counsel for Nicaragua, Professor Chayes.

Professor **CHAYES**: Mr. MacMichael, before we proceed may I remind you that at the beginning of your testimony you made a solemn declaration, upon your honour and conscience, to speak the truth, the whole truth and nothing but the truth, and your testimony today is subject to the same declaration.

Let me recall to the Court that when Commander Carrión came back to the stand last Friday, Mr. MacMichael was testifying about a plan prepared by the CIA for submission to the President of the United States, calling for covert activities against Nicaragua. He identified the plan as the one that was submitted for presidential approval and reported to the House and Senate Intelligence Committees in November 1981. He testified that he had participated in a discussion of the plan within the Central Intelligence Agency in the Fall of 1981, and he outlined the general elements of the plan and the ways in which it was anticipated that the Nicaraguan Government would respond. I shall now proceed with this line of questioning.

Mr. MacMichael, you have described the plan in general terms. I would now like to read from a newspaper account in the *Washington Post* purporting to contain excerpts from the actual CIA proposal to the President. It is reprinted in Annex F, submitted with the Memorial (Item 4, pp. 6-7).

The newspaper account reads:

> "According to highly classified NSC records the initial CIA proposal in November called for 'support and conduct of political and paramilitary operations against the Cuban presence and Cuban Sandinista support structures in Nicaragua and elsewhere in Central America'. The CIA in seeking presidential authorization for the $19 million paramilitary force emphasized that 'the programme should not be confined to that funding level or to the 500-man force described' the records show. Covert operations under the CIA proposal, according to the NSC records are intended to: 'build popular support in Central America and Nicaragua for an opposition front that would be nationalistic anti-Cuban and anti-Somoza' [the quotation continues:] 'support for the opposition front through formation and training of action teams to collect intelligence and engage in paramilitary and political operations in Nicaragua and elsewhere' 'work primarily through non-Americans' to achieve these covert objectives, but in some cases the CIA might take unilateral paramilitary action — possibly using United States personnel — against special Cuban targets."

Q. To your recollection, does that accurately describe the plan that was discussed at the meeting you attended?

A. Yes, it does. I do not in all honesty recall the emphasis or any discussion there of the possible unilateral use of United States forces or personnel against Cuban targets, but the rest of it squares very well with my recollection.

Q. What was the overall purpose of the plan according to the discussion?

A. The overall purpose, as I think I stated previously, was to weaken, even destabilize the Nicaraguan Government and thus reduce the menace it allegedly posed to the United States interests in Central America.

Q. How was it supposed that the plan would accomplish these objectives?

A. As I recall, and as I believe I stated the other day, the principal actions to be undertaken were paramilitary which hopefully would provoke cross-border attacks by Nicaraguan forces and thus serve to demonstrate Nicaragua's aggressive nature and possibly call into play the Organization of American States provisions. It was hoped that the Nicaraguan Government would clamp down on civil liberties within Nicaragua itself, arresting its opposition, demonstrating its allegedly inherent totalitarian nature and thus increase domestic dissent within the country, and further that there would be reaction against United States citizens, particularly against United States diplomatic personnel within Nicaragua and thus serve to demonstrate the hostility of Nicaragua towards the United States.

Q. In the plan itself, was there any reference to the use of paramilitary forces to interdict a supposed flow of arms from Nicaragua to rebels in El Salvador?

A. This was the stated purpose of the armed force to be organized. Yes, they were to interdict the alleged flow of arms.

Q. Did the plan itself, or any supporting documents, refer to any evidence of such an arms flow?

A. The plan merely stated in the discussions that such arms flow existed and no supporting documents were presented.

Q. Was any other evidence of this type discussed at the meeting you attended?

A. No. It was merely assumed that it went on.

Q. You have testified that in Bangkok you examined problems of supplying guerrilla bands in the field with a view to verifying whether such supplies had come from outside sources and, if so, with a view to considering what measures might be taken to interdict those supplies. Is such a study ordinarily conducted as a matter of good professional practice as a preliminary to deciding on and designing a counter-insurgency arms interdiction programme?

A. In my experience, I believe that would be the professional practice to determine, as best one could, what was the system one hoped to disrupt, and design a force as part of a counter-insurgency system to do that.

Q. In your judgment as a professional, is it possible without such an analysis to design an effective programme to interdict arms supply to guerrilla forces?

A. Well, I do not believe it would be, and I will state that this is what first caused me concern in this matter simply as a result of professional background that these studies and analyses fully describing the arms supply system — other parts of the supply system — for the insurgent forces in El Salvador were not being conducted and that a force was being put into the field for the purpose of disrupting that system without, it appeared to me, the proper analysis behind it.

Q. And was such an analysis ever undertaken while you were at the Agency?

A. Not to my knowledge, and I believe I would have known it it had been.

Q. Now you stated earlier that the stated purpose of the plan was arms interdiction. In the light of your answers to these last few questions, would you elaborate on what you meant by your earlier characterization of "arms interdiction" as the stated purpose of the plan.

A. Well, I think you will understand that this was a covert operation, and that in designing any covert operation was built into it — what is known as — plausible denial, that is you set it up so that if you are detected, or if the plan is detected, the operation's being uncovered, you have some justification either for denying participation or for making it clear that you had a reason for doing what you were doing. Now, in this case, I believe that part of the justification was the need to convince the intelligence committees of the United States Congress to authorize the plan and approve it and arms interdiction, I think, was a reason that they would approve because as the passage of the Boland amendment the following year demonstrated that such purposes as provoking hostilities between Nicaragua and any of its neighbours, or the destabilization of the Nicaraguan Government through this programme were prohibited purposes.

Q. To your knowledge was the plan ever put into effect?

A. Yes, it was.

Q. Can you tell us anything about the CIA involvement in the execution of this plan after it was approved by the President and put into effect?

A. No, I cannot talk about any operational details.

Q. Now, I want to talk about the rest of your employment, not only that but this period too, with the CIA. You were employed by the CIA, the Court will recall, from March 1981 until April 1983; is that correct?

A. That is correct.

Q. During that entire period was it part of your responsibility to be familiar with and analyse the intelligence collected by the United States Government on the subject of delivery of arms or other war materials from Nicaragua to rebels in El Salvador?

A. Yes, it was.

Q. Now, how did that come about that that was part of your responsibility?

A. Well, as I testified previously on the structure of the National Intelligence Council and the way in which the analytic group, of which I was part, worked in the Council, as a matter of practice members of the analytic group tended to specialize on one area as I did on the western hemisphere (Latin America, if you will) and as I also said we were responsible as individuals to report to the National Intelligence Council on matters of interest and concern; we were expected to show initiative, to develop subjects independently — we were, after all, a supposedly high level and qualified group — and as the work I was doing involved me first in a review of the special National Intelligence estimate of the nature of the Salvadoran insurgency, the work I did relative to Nicaragua, my awareness of the covert operation ongoing or under way, and the justification of it on the grounds of the arms flow, my concern, as I have expressed was about the proper design of an arms interdiction system which led me as a matter of my professional responsibility, and working with the approval of the National Intelligence officer at large who controlled our actions, to continue to make a close study of intelligence relating to the alleged arms flow from Nicaragua to El Salvador.

Q.: In the course of that work did you have access to original intelligence materials, for example, photographs, records of communications, intercepts, reports of interrogations, and the like?

A.: Yes, I did.

Q.: And did you examine them personally?

A.: Yes, I did.

Q.: Did you have access to so-called "finished" intelligence — summaries and reports based on or analysing the original raw material?

A.: Yes, I did.

Q.: Did you have occasion to discuss these issues of arms flow personally in debriefing intelligence officers who were, or had been, operating in the field?

A.: On various occasions, I did that, yes.

Q.: Did you ever make a request to see or review any intelligence material pertaining to this subject that was denied?

A.: No.

Q.: So you were familiar with the intelligence information that the United States Government collected with respect to arms or weapons trafficking between Nicaragua and rebels in El Salvador?

A.: Yes, I was.

Q.: All right. I want to direct your attention now to the period of your employment with the Agency; was there any credible evidence that during that period, March 1981 to April 1983, the Government of Nicaragua was sending arms to rebels in El Salvador?

A.: No.

Q.: Was there any substantial evidence that during this period arms were sent from or across Nicaraguan territory to rebels in El Salvador with the approval, authorization, condonation or ratification of the Nicaraguan Government?

A.: No, there is no evidence that would show that.

Q.: Was there any substantial evidence that during the same period, any significant shipments of arms were sent with the advance knowledge of the Government of Nicaragua from or across its territory to rebels in El Salvador?

A.: There is no such substantial evidence, no.

Q.: Was there any substantial evidence that during that period significant quantities of arms went to El Salvador from Nicaragua?

A.: From Nicaragua, that is originating in Nicaragua, no.

Q.: Was there substantial evidence of shipments of arms from other countries in the region to the El Salvador guerrillas?

A.: Yes, there was.

Q.: Could you give us some examples, please?

A.: I think the best known of these is the evidence developed on 15 March 1982, when there was a raid on an arms depot in San José, Costa Rica, at which time a considerable quantity of arms, well over a hundred rifles, automatic weapons of various sorts, other ordnance, mines and so forth, were captured there along with a significant number of vehicles — more than half a dozen I believe — that were used to transport these arms, or were designed for transporting them. Documents were captured with the people captured there — a multinational group I would say — which indicated that certainly more than half a dozen shipments of arms had already been made from that depot. The reason I failed to tell you on your previous question, Professor Chayes, was that it would appear to me that if arms were shipped from San José, Costa Rica, by vehicle, they must have in some way had to get across Nicaragua.

Q. Now, you are familiar with the different methods and sources of intelligence that the United States employs?

A. Yes, I am.

Q. I am going to ask you a number of questions, based on information publicly available in the press and scholarly publications, about methods and sources of intelligence that are said to be employed by the United States. As to each one, I am going to ask you if you know whether or not that method or source was employed in an effort to obtain evidence of the delivery of arms or other war materials from Nicaragua to rebels in El Salvador. As I said before, I do not want you to say anything in responding to these questions that would involve unauthorized disclosure of information.

Let us begin with satellite photography. Is it a method of intelligence-gathering that was employed in an effort to obtain evidence of arms deliveries from Nicaragua to rebels in El Salvador?

A. Now I don't recall that satellite photography or surveillance was used specifically for this purpose. I think it was used for gathering information about supposed or suspected shipments of arms and other materials from other places in the world to Nicaragua, but not for the shipment of arms to El Salvador.

Q. What about aerial photography?

A. Yes, this was used.

Q. Were special surveillance aircraft used?

A. Yes, they were.

Q. Can you tell us about electronic interception of radio, telephonic and other communications?

A. Yes, interceptions of radio communications were used.

Q. There have been reports in the newspapers about a United States radar facility on Tiger Island in the Gulf of Fonseca between Nicaragua and El Salvador. Perhaps you could say how wide that Gulf is?

A. I think from the furthest point of Nicaraguan territory to the nearest point of Salvadoran territory there is a stretch of something over 30 kilometres of water. The area is right here (indicates on map).

Q. If the judges wish to locate it on their maps? Can you say whether there is such a facility on Tiger Island?

A. I know there was, and I believe there still is there.

Q. By what agency of the United States Government is it operated?

A. That facility was manned by the United States Marine Corps.

Q. Would the CIA have access to the information gathered by this facility?

A. Oh yes.

Q. What is the principal function of this facility?

A. It was a radar facility that was designed to survey air and water traffic in the Gulf and surrounding areas — coastal areas.

Q. Did United States naval vessels operate in conjunction with the Tiger Island facility?

A. Yes, this was part of a surveillance, you know the electronic radar surveillance system which gave coverage, not only of the Gulf of Fonseca but for a considerable distance, a very long distance — I do not recall the exact mileage, but it is a very long distance — up and down the Pacific coast of Central America.

Q. And was this system able to locate and track boats moving through the area?

A. Yes.

Q. There have also been published reports about the use of United States Navy SEAL teams on surveillance missions in and around the Gulf of Fonseca. Do you have any knowledge about that?

A. Yes, the SEAL teams were employed for some time there — yes, they were.

Q. What is a SEAL team exactly and what do they do in the Gulf of Fonseca?

A. The acronym stands for sea, air, land. These are very highly trained special operations forces of the United States armed forces. They are naval personnel trained in underwater demolition, parachuting and other techniques. Their major purpose is to conduct a variety of special operations, including reconnaissance and surveillance in coastal waters and near inshore areas. They are capable of carrying out raids, reconnaissance, small boat operations, they are considered really as the most highly trained and best equipped of the United States special operations forces.

Q. Another source of intelligence information is agents. Did the CIA employ such agents in an effort to obtain evidence of arms deliveries from Nicaragua to rebels in El Salvador?

A. Yes, it did.

Q. How about reports from United States diplomatic and military personnel in the area?

A. Yes, reporting from these sources is all part of the information flow that is going on.

Q. Were foreign diplomats and military personnel used as sources of intelligence in this effort?

A. Yes. I should explain this a little bit. This does not mean that such personnel were in the employ of the United States Government or controlled by the Central Intelligence Agency or any other agency of the United States. It is just that in the course of their work, not only Central Intelligence Agency personnel but other United States personnel operating in a foreign country will routinely report on germane conversations that they have with their fellows operating in the same country. And I think I should also say, since you use the term intelligence here, that intelligence really has to be considered merely as information that is gathered and handled in a specific way. I think one could say that when reduced to paper intelligence is merely information that has a classification stamp placed on it, and to speak of intelligence is in no way to give a higher reliability to information; and this is what we were talking about, Professor Chayes, is simply that this information is coming from a variety of sources.

Q. Were defectors a source of intelligence information in the effort to obtain evidence of arms deliveries?

A. Oh yes, they were.

Q. How about prisoners, captured rebels and the others?

A. These are standard and usual sources of information.

Q. Captured documents?

A. Yes, those too.

Q. Were there any significant sources and methods of intelligence gathering that the United States normally uses that were not employed in its effort to obtain evidence of arms deliveries from Nicaragua to rebels in El Salvador?

A. No, I would say all usual means were employed.

Q. Now, I am going to ask you to evaluate, or to turn your attention to, the United States intelligence capability in the area, and my question is this: considering all of the sources and methods of intelligence used by the United States that we have just catalogued, and your knowledge of the extent of their use with respect to Nicaragua, please describe in general terms the nature and scope of United States intelligence capabilities with respect to Nicaragua.

A. Technically, in so far as I can judge, they were of a very high order. Certainly there were a great number of resources concentrated there in a very small area, so I would have to say that the capabilities of the United States intelligence in the area were very high indeed.

Q. Can you say from your own knowledge based on your service in the Central Intelligence Agency whether Nicaragua has been a high priority target of United States intelligence-gathering efforts?

A. I would say that it has been a high priority.

Q. In your opinion, if the Government of Nicaragua was sending arms to rebels in El Salvador, could it do so without detection by United States intelligence-gathering capabilities?

A. In any significant manner over this long period of time I do not believe they could have done so.

Q. And there was in fact no such detection during the period that you served in the Central Intelligence Agency?

A. No.

Q. In your opinion, if arms in significant quantities were being sent from Nicaraguan territory to the rebels in El Salvador — with or without the Government's knowledge or consent — could these shipments have been accomplished without detection by United States intelligence capabilities?

A. If you say in significant quantities over any reasonable period of time, no I do not believe so.

Q. And there was in fact no such detection during your period of service with the Agency?

A. No.

Q. Mr. MacMichael, up to this point we have been talking about the period when you were employed by the CIA — 6 March 1981 to 3 April 1983. Now let me ask you without limit of time: did you see any evidence of arms going to the Salvadoran rebels from Nicaragua at any time?

A. Yes, I did.

Q. When was that?

A. Late 1980 to very early 1981.

Q. And what were the sources of that evidence?

A. There were a variety of sources: there was documentary evidence, which I believe was credible; there were — and this is the most important — actual seizures of arms shipments which could be traced to Nicaragua and there were reports by defectors from Nicaragua that corroborated such shipments.

Q. Does the evidence establish that the Government of Nicaragua was involved during this period?

A. No, it does not establish it, but I could not rule it out.

Q. At that time were arms shipments going to the El Salvadoran insurgents from other countries in the region?

A. Yes, they were.

Q. Could you give us examples?

A. There were shipments at that time which could be traced to Costa Rica; there were shipments at that time that could be traced as having come through or via Panama.

Q. And did the evidence of arms traffic from Nicaragua, if any, come to an end?

A. The evidence of the type I have described disappeared. It did not come in any more after very early 1981, February/March at the latest.

Q. You say at some time, just about the time you got to the Agency, the evidence stopped coming in; did it ever resume?

A. As I have testified, no.

Q. Now I direct your attention to the period after you left the CIA in April 1983. Did you follow the public statements by United States officials as to the existence of an arms flow from Nicaragua to rebels in El Salvador?

A. Yes, I did.

Q. And how did that happen?

A. I had developed what you might describe as an interest in the subject and I did not relinquish that interest when I left the employ of the CIA, so I continued to follow it.

Q. Have you analysed the purported evidence put forth publicly by the United States Government to support its allegations that such an arms flow exists?

A. Yes, I have.

Q. What is your expert opinion of the evidence that the United States has publicly disclosed?

A. I would describe that evidence which has been publicly disclosed by the United States in various publications and statements by United States officials as very scanty. I would say much of it is unreliable, some of it is suspect and I believe it has been presented in a deliberately misleading fashion on many occasions.

Q. Could you tell us what you mean by unreliable or suspect?

A. There are a couple of things which strike me in looking at some of this information. There is a very heavy reliance in the presentation of this information, or its documentation, on statements, on press accounts, and especially upon accounts appearing in the foreign press, for example statements made in newspapers in Central America. Part of any covert operation as I hinted at, or even explained, a little earlier incorporates an element of disinformation. One of the primary means for doing this is the planting of articles in the press, and under some circumstances I think an informed person would suspect that some of the articles cited in support of the United States Government's position as evidence when it refers to press articles, as I say, allows the suspicion — and I said that the information was suspect — that these were articles originally planted by United States intelligence agencies, and for that reason I have some problems accepting them at face value.

A second aspect of the information presented is a very heavy reliance on defectors or captives, which I cannot certainly impeach directly. But the fact is that some of these statements are made by people who are or have been in the custody of the United States or other foreign governments for considerable periods and still are when they make the statements. As you know, on one famous occasion the United States Government was seriously embarrassed when a captive was brought before an audience in Washington, D.C. — a Mr. Tardencillas — to testify to his involvement in the Salvadoran insurgency as a representative of the Nicaraguan Government and recanted the statements he had previously made while under captivity in El Salvador and stated flatly that he only said those things because of the pressures he faced in his captivity. These are reasons why I tend to suspect certain information coming in certain ways.

Q. Does any of this publicly disclosed material cause you to alter your opinion in any way as to the shipment of arms from Nicaragua to rebels in El Salvador?

A. No, it does not cause me to alter my opinion.

Q. The United States has stated that it has evidence that it cannot reveal for fear of compromising sensitive intelligence sources. I am going to ask you some questions to assist in analysing that claim. In this situation — surveillance of supposed arms trade between Nicaragua and the Salvadoran insurgents — would there be particularly sensitive intelligence sources or methods that we would not want to disclose?

A. I would think the answer to that is yes, obviously.

Q. What would they be?

A. The ones that would occur to me particularly would be the protection of the identity of agents, obviously — human sources. One would be concerned for cryptographic security and possibly having implanted listening or other surveillance devices in important places one would not wish to reveal information that would cause the discovery of these.

Q. Perhaps you could tell the Court what you mean by cryptographic security?

A. In the simplest sense here, is that if you were deriving information because you had broken your opponent's code, you would not wish to refer to particular communications, encoded communications that you had intercepted, which would then tell your opponent that you had broken his code because he would then change his codes, and you would be faced with the task of decifering another one.

Q. Let us assume that undercover agents or coded communications intercepts were providing accurate and reliable information concerning large-scale arms shipments from Nicaragua to the rebels in El Salvador. Would there be any way of revealing such evidence publicly without jeopardizing those sources?

A. In the context of your question, and presuming that these intercepts or sources were providing accurate information over any significant period of time, then you would be able to use this information in order actually to intercept shipments of arms.

Q. And then you could make public the intercept?

A. That would be my opinion, yes.

Q. But there have been no such intercepts?

A. No, there have not.

Q. Do you have a professional opinion on the United States Government's statements that concern for protection of its sources and methods of gathering intelligence prevents it from making public evidence of the alleged Nicaraguan arms traffic?

A. I simply do not accept that statement at face value. I am very suspicious of it.

Q. Now to summarize your testimony. You had access to and reviewed, in your professional capacity and as part of your duties for the Central Intelligence Agency between March 1981 and April 1983, the intelligence information on the subject of arms supply to the Salvadoran rebels, is that correct?

A. That is correct.

Q. That includes intelligence information from all the sources of intelligence that we have catalogued earlier in your testimony?

A. Yes, it does.

Q. In the intelligence information you reviewed, you found no convincing evidence of the supply of arms to the Salvadoran rebels by the Nicaraguan Government or the complicity of the Nicaraguan Government in such supply?

A. I did not find any such evidence.

Q. I would like to ask you, in your capacity as a professional intelligence analyst, does the absence of such evidence have any significance in evaluating the question of Nicaraguan supply of the Salvadoran rebels?

A. I would say that it casts serious doubt on the proposition that the Nicaraguan Government is so involved.

Q. Will you state again your overall conclusion as to the existence of arms traffic from Nicaragua to the Salvadoran insurgents?

A. I do not believe that such a traffic goes on now or has gone on for the past four years at least, and I believe that the representations of the United States Government to the contrary are designed to justify its policies toward the Nicaraguan Government.

Professor CHAYES: That concludes the direct examination of Mr. MacMichael.

QUESTIONS PUT TO MR. MacMICHAEL BY JUDGES NI AND SCHWEBEL

The PRESIDENT: Two Judges have asked for the floor in order to put a question. Judge Ni and Judge Schwebel in that order. Judge Ni has the floor, he will ask his question. Would you like to have a copy of the question?

Mr. MacMICHAEL: Yes please.

Judge NI: I have two questions to ask the witness. The first one is, during the examination last Friday you were asked by Professor Chayes, is "Top Secret" the highest form of the clearance categories in the United States classification system. Your answer was, "Formerly, yes". You did not elaborate whether it was no longer the case now or what the place of top secret is now in the classification system. Can you explain further on this point?

Mr. MacMICHAEL: Your Honour, I must apologize for my poor enunciation. What I intended to say was formally, that is in form, yes that this is the highest classification recognized by the system, but there are means of close-holding and distributing certain intelligence only to selected persons. This is designated by types of letter designations that follow the clearance listing, there are directories that handle this and I do apologize for confusing you on the issue. I am sometimes confused myself.

Judge NI: Mr. President, I want to apologize to you. This should be struck from the records because it stands as "formerly" and now you are saying it was "formally"?

A: Yes, your Honour.

Q: My second question is, you were asked last Friday to tell the Court generally the outline of the plan which was discussed at a meeting of the Latin American Affairs Office in the Fall of 1981. You made a very succinct statement of the plan, that a covert force of approximately 1,500 men was to be organized to carry out military and paramilitary action in Nicaragua. Can you describe it more specifically, such as how this force was to be recruited and what instructions were to be given to the commanders of the force, etc. I believe you have described to some extent, in more detail today, but I wish that these two points, which I raised, as to how were they to be recruited and what instructions were to be given be answered more specifically.

A: To the best of my recollection, your Honour, reference at this meeting was made to existing anti-Sandinista forces who were currently operating in the area and that these groups were to be organized and given supplies and assistance. I do not recall, and I do not believe, that at the meeting to which I referred that I heard anything about the instructions that were to be given to the commanders of those forces. I am sorry I cannot give you any more details than that but that is to the best of my recollection.

Judge SCHWEBEL: Mr. MacMichael, you were not present in Court when the Agent of Nicaragua read out Article 53 of the Court's Statute; it indicates that while the Court can render judgment in the absence of a State party, it cannot render a default judgment. Before deciding in favour of a claim, the

Court "must satisfy itself that the claim is well-founded in fact and law", that is to say, that a sufficient *defence* to the claim is *not* well-founded in fact and law.

Now I take it that your testimony has been essentially directed to this question of whether there is a defence to the claim, and you will appreciate that the purpose of the questions I am about to ask you are directed towards that same matter. My first question is this. You stated that you went on active duty with the CIA on 6 March 1981 and left on 3 April 1983, or about that date. Am I correct in assuming that your testimony essentially relates to the period between March 1981 and April 1983, at least in so far as it benefits from official service?

Mr. MacMICHAEL: That is correct, your Honour, and I have not had access since I left to classified materials, and I have not sought access to such material.

Q.: Thus, if the Government of Nicaragua had shipped arms to El Salvador before March 1981, for example in 1980 and early 1981, in order to arm the big January offensive of the insurgents in El Salvador, you would not be in a position to know that; is that correct?

A.: I think I have testified, your Honour, that I reviewed the immediate past intelligence material at that time, that dealt with that period, and I have stated today that there was credible evidence and that on the basis of my reading of it I could not rule out a finding that the Nicaraguan Government had been involved during that period.

Q.: Would you rule it "in"?

A.: I prefer to stay with my answer that I could not rule it out, but to answer you as directly as I can my inclination would be more towards ruling "in" than ruling "out".

Q.: Are you aware, Mr. MacMichael, of the fact that the *New York Times* of 8 September 1985 published a report of an interview with Professor Chayes and Mr. Reichler, which says that "the lawyers for Nicaragua said that they would acknowledge that the Managua Government supplied arms to Salvadoran guerrillas for the big January offensive against the United States-backed Government in El Salvador"? And that "Mr. Reichler said that he strongly advised Nicaragua that it should not undertake the Court suit if it were still involved in arms traffic to El Salvador; have you seen that story?

A.: I was not in the United States when that story appeared so I don't recall seeing it.

Q.: Mr. MacMichael, is it correct to characterize Congressman Edward P. Boland, Chairman of the House Permanent Select Committee on Intelligence, as a leading opponent of United States policy in respect of support of the *contras*?

A.: I think it would be fair so to characterize him, yes, your Honour.

Q.: Would he have been briefed by intelligence officials on evidence supporting the United States claim that Nicaragua has been sending arms and lending other support to the insurgents in El Salvador?

A.: Yes, certainly in his capacity as the then Chairman of the House Intelligence Committee he received those briefings.

Q.: Now if your analysis of the force of intelligence collected in the period of your service is correct, how can you explain that Congressman Boland would have stated the following, as he did:

> "There is . . . persuasive evidence that the Sandinista Government of Nicaragua is helping train insurgents and is transferring arms and financial support from and through Nicaragua to the insurgents. They are further

> providing the insurgents bases of operations in Nicaragua . . . What this says is that, contrary to the repeated denials of Nicaraguan officials, that country is thoroughly involved in supporting the Salvadoran insurgency. That support is such as to greatly aid the insurgents in their struggle with government forces in El Salvador."

This was the view of Congressman Boland to which he has, as far as I know, adhered to this day. How do you explain that?

A. Your Honour, this is a very important question and certainly one that I have attempted to deal with myself. I do not like to believe that my powers of judgment are greater than those of Congressman Boland. He has certainly seen the evidence, and it is my belief that the evidence that he saw was essentially the same evidence that I saw. I think, your Honour, I can refer you to a criticism that Congressman Boland's committee made on 17 September 1982 of the evidence that had been presented to them on the situation in Central America which I presume included that dealing with Nicaragua and its alleged relationship to an arms flow to El Salvador.

In a report issued, if I recall correctly, on 17 September 1982 by the House Intelligence Committee's subcommittee on evaluation of intelligence, reference was made to the presentation to that Committee of intelligence on Central America by the Central Intelligence Agency and other spokespersons for the Administration, and it was concluded, amongst other things, but I think this is the most relevant portion of the statement, that those presentations by the Administration seemed designed, and I am quoting here I think very closely, more to present the Administration's position than to illuminate the situation.

I am also aware that in May 1983 Mr. Boland's House Committee issued a report to which I believe all the members subscribed, both Democrat and Republican, and I do not know if that is the source from which you drew your statement, but it certainly represents a close approximation of Mr. Boland's statement as you read it to me, in which they found — and I believe the adjective used was "overwhelming" — the evidence that Nicaragua was involved in the supply of arms to the rebels in El Salvador and that without such provision of arms the Salvadoran insurgency would not exist. Naturally, I took that very seriously, because I have the greatest respect for Mr. Boland as I do for the others of that Committee, and I was interested to note as I read that report carefully that it was a report supporting House resolution, I believe the number is 2760, which called for an end to the funding for the *contras*. The reasoning employed by the Committee in reaching that recommendation was essentially that if the flow of arms from Nicaragua to El Salvador continued at such a high rate over such a period of time as the Administration claimed it did, obviously the *contras* — if I may use that general term as the force that was being provided — that force was obviously not serving the purpose for which it had been funded, and it should therefore be abolished. I do not know, and certainly could not demonstrate, I am sure, to anyone's complete satisfaction that the method employed in reaching that, both the proposition and then the conclusion following it, had something of the nature of a stipulation and it was not. I raise that question with you, your Honour, in what I hope is a response to your question.

Q. Thank you so much, Mr. MacMichael, and that raises in my mind this question: let us suppose for a moment that your thesis is correct and that the arms flow from Nicaragua to El Salvador in the period of your tenure had substantially or entirely ceased. Let us assume for the moment that there were shipments of arms from Nicaragua to the El Salvador insurgents for the big offensive at the beginning of 1981, that, as Commander Carrión has testified, by the end of 1981, the CIA's support for the *contras* was in place. You come aboard I think in March 1981 and you are there until 1983, and during at least much of this period the *contra* operation was being funded actively and was in place. Is it not a plausible supposition that, far from being ineffective the *contras* were most effective, and that the very reason why the Nicaraguan Government stopped sending arms, if indeed it did, was because of the pressure of the *contras*? It could see that it was a counter-productive policy because it had produced United States funding of the *contras* where United States demarches had produced nothing. Is that plausible?

A. I think it is plausible, your Honour, and I would go on with my response, if you desired me to do so. It is my proposition indeed, and my opinion if I may say so, that the alleged flow of arms from Nicaragua to the Salvadoran insurgents ceased, that no credible substantial evidence of such an arms flow existed in the time that I was examining it, and you propose, if I understand your question, that an explanation for this would be the excellent and effective interdiction and preventive work of this *contra* force.

Q. No, if I may make myself a bit clearer, I am not suggesting that the *contras* were necessarily effective in interdicting arms flows. They may have been somewhat effective, they may have been ineffective, I frankly do not know, but my suggestion of a plausible explanation of the events you have described is that Nicaragua had perceived, that a policy of sending arms to insurgents in El Salvador had a price, and they feared it might have an even greater price, and therefore they stopped sending arms, if indeed they did, on which I take no position. I am just offering a hypothesis.

A. The statement I was going to make there is, assuming that that is correct, it is then very difficult to explain why through the whole period the United States Government continued to maintain that this flow of arms went on, if indeed it had stopped as a result of the Nicaraguan Government's recognition of the perils it faced in continuing to involve itself, or appeared to involve itself. It is indeed strange to me that the United States Government continued to claim it went on.

Q. I quite agree, if indeed it had stopped. I said that I am speaking in terms of a hypothesis.

To turn to another aspect of these facts, Mr. MacMichael, is it a fact that leaders of the El Salvadoran insurgency are based in Nicaragua and regularly operate without apparent interference from Nicaraguan authorities in Nicaragua?

A. I think the response to that question would have to be a qualified yes, in that political leaders and, from time to time, military leaders, of the Salvadoran insurgency have been reported credibly to have operated from Nicaragua, that this was referred to frequently by the United States Government as a command and control headquarters, and that such an action could certainly be defined as one unfriendly toward the Government of El Salvador recognized by the United States. I have confined my testimony to the charge of the arms flow. To my knowledge, the United States Government did not justify or attempt to justify its support for this covert force on the grounds that a directing group of the Salvadoran rebels, either habitually or from time to time, made its headquarters in Nicaragua.

Q. May I ask if you have read the Declaration of Intervention of the Republic of El Salvador filed in this case on 15 August 1984?

A. I have not.

Q. May I recall that that Declaration contains detailed accounts of the shipment of arms from Nicaragua to insurgents in El Salvador, maintains that the general headquarters of the Farabundo Marti National Liberation Front is located near Managua, and claims that:

> "In addition to the entire terrorist training operation established in Cuba, since mid-1980 the Sandinista National Liberation Front has made available to Salvadoran guerrillas training sites in Nicaraguan territory."

What in particular is your view of this charge of the existence of training sites in Nicaragua?

A. I have no direct or current knowledge of those. I am not trying to avoid your question, your Honour, it is just a thing that I have heard charged. I do not want to trivialize this response, but let me say this because it may help to put it in perspective. I have seen aerial photographs, provided through intelligence systems, of places in Nicaragua identified as FMLN training camps and some places where, for example, white-washed stones are put out with the initials FMLN. I could not help but notice as I took the tram to Delft yesterday that a large wall in Rijswijk is painted with the letters FMLN. As I say I do not wish to trivialize it, but there is, and I accept this fully, I believe, as Nicaragua has stated, there is diplomatic, political and moral support for the FMLN. There is also a considerable Salvadoran population which resides technically as refugees, within Nicaragua. These people are not confined to camps as they are elsewhere in Central America. They live within the economy there, and go about their business freely. I am more than willing to believe, as a matter of fact, as a matter of experience, I assume that just as is believed, for example that Irish-Americans, resident in New York City and Boston, occasionally do make the odd lot of arms and other assistance, monetary and otherwise, available to the Irish Republican Army in Ulster, that this Salvadoran population whose symphathies, I assure you from some contact with them, are basically with the FMLN, find means to get support to their brethren in El Salvador. Now whether the Nicaraguan Government should be more diligent in policing the activities of these people is another question, and one to which I cannot meaningfully respond. I hope that in responding, your Honour, I have not trivialized your question.

Q. No, not at all, and it is a real question whether or not the Nicaraguan Government is doing what it can to prevent such activities, if that is its policy. But, a second question is: is the policy of the Nicaraguan Government not to prevent, but to assist such activities, which I do not think is the policy of the United States Government, in any event, vis-à-vis insurgent operations in Northern Ireland.

Now, Mr. MacMichael, it was acknowledged in Court last week on behalf of Nicaragua that, before Somoza's overthrow, the Sandinistas had received foreign assistance — arms and training — and that among the States giving such assistance was Cuba. Do you have reason to believe that, whereas Cuba gave such assistance to Sandinistas, it denies such assistance to the insurgents of El Salvador?

A. Denies, in what sense, your Honour?

Q. Refuses to give it, declines to give it, fails to give it.

A. I think I have reason to believe that the Cuban Government is supportive of the FMLN.

Q. If Cuba does give such assistance, not simply moral support, but arms, training and so on, would it not be plausible for it to channel some of that assistance through Nicaragua, to whose Government Cuba has given such massive assistance since the Sandinistas took power?

A. I would like to answer in this way: first of all, as a general proposition I do not see any reason that the fact that if Cuba provides massive economic support to Nicaragua or any economic support to Nicaragua, it would necessarily follow that it would channel its assistance, if any, to the FMLN through Nicaragua. It might choose, as a matter of reason, to protect its investment in Nicaragua by channelling it in some other place. But, I would say that my opinions about the nature and type of Cuban support to the FMLN would not, and I am trying to use good judgment here in saying this, would not necessarily, or needfully mean that Cuba was going to require, if that is what you intended in your question, that Nicaragua also involve itself directly in its support.

Q. Thank you. No, that was not the purport of my question. The purport of it was this, that since Cuba is sending very large quantities of arms to Nicaragua, while co-operating with the Soviet Union in the sending of such arms, is it not plausible that it would, being an ardent supporter of the rebellion in El Salvador, choose to channel some of those arms through Nicaragua?

A. I can only say it might. I cannot speak for it. But let me just go a little bit further. I am speaking now of my experience within the CIA, within the intelligence community, trying to deal with these questions and get down to hard evidence, and as I explained to the Court previously, my training has unhappily been as a historian and I have a penchant for re-examining evidence perhaps too closely. I do not know, but the question of assumptions comes up all the time. For example, at one period I recall, when there were a considerable number of messages intercepted, we have talked about intercepts, so I think I can mention this, in which Cuban aircraft, at the time when Cuba was providing a great number of teachers in Nicaragua, had cargoes described as notebooks and pencils, there was an assumption by a certain number of my fellow analysts that these were jargon terms referring to rifles and bullets. Now, that is my feeling about assumptions, it may be that you are absolutely correct, I just cannot draw the assumption clearly myself.

Q. I am not drawing conclusions either, Mr. MacMichael, I am just asking you would it be plausible?

A. Plausible, yes.

Q. Mr. MacMichael, have you heard of Radio Liberacion?

A. I have heard of Radio Liberacion, yes.

Q. What is it? Can you tell the Court, please?

A. It was a predecessor of the present Radio Venceremos which is used by the FMLN in El Salvador. I believe that at one time a radio broadcast under the title of "Radio Liberacion" was supposed to have originated from Nicaraguan soil.

Q. Did they in fact originate from Nicaragua, to the best of your knowledge?

A. To the best of my knowledge I think I would say yes, that is the information I have.

Q. Have you heard of an airfield in Nicaragua at Papalonal, or an airstrip?

A. Yes, I have.

Q. Are you aware of the fact that the United States Government under the Carter Administration made representations to the Nicaraguan Government about the use of that airfield as a principal staging area for the airlift of arms to insurgents in El Salvador?

A. Yes, I recall that very well.

Q. In an interview with the *Washington Post* published on 30 January 1981, the outgoing Secretary of State, Edmund Muskie, stated that arms and supplies being used in El Salvador's bloody civil war were flown from Nicaragua "certainly with the knowledge and to some extent the help of Nicaraguan authorities". Now as you know the Administration for which Mr. Muskie spoke had given more than $100 million in aid to the Sandinista Government since it took power.

A. That is correct.

Q. More than the United States had given Nicaragua under the Somozas in more than 40 years. Do you think that Mr. Muskie was speaking the truth?

A. Oh yes, in that case. For example, I spoke earlier under direct questioning from Professor Chayes regarding information that had existed for that period — late 1980 to very early 1981 — and when I mentioned defectors I had in mind as a matter of fact some persons who testified under interrogation — I should not say testified — but who stated under interrogation following their departure from Nicaragua that they had assisted in the operations out of Papalonal in late 1980 and very early 1981, and as I say, I am aware of this; there was also an interception of an aircraft that had departed there — that had crashed or was unable to take off again from El Salvador where it landed — and I think that was in either very early January or late December 1980 and this was the type of evidence to which I referred, which disappeared afterwards.

Q. I understand you to be saying, Mr. MacMichael, that you believe that it could be taken as a fact that at least in late 1980 or early 1981 the Nicaraguan Government was involved in the supply of arms to the Salvadoran insurgency. Is that the conclusion I can draw from your remarks?

A. I hate to have it appear that you are drawing this from me like a nail out of a block of wood but, yes, that is my opinion.

Q. Now let us turn to 1982 because you referred to an episode a little while ago in that regard, namely, that arms were found in — I believe you said — San Jose, Costa Rica, on 15 March 1982 — rifles, etc., and the multinational group tending to this arms cache was found. Now as I believe you know, Cuba sent large quantities of arms to the Sandinistas when they were fighting Somoza through, and to, Costa Rica, and the Costa Rican National Assembly made an investigation of that arms traffic and reported that quantities of those arms had been left behind in Costa Rica after the overthrow of Somoza. Do you believe that this arms cache indeed was of Cuban origin, destined for the Sandinistas, and in fact, perhaps with the aid of Costa Rican collaborators, meant to move on to El Salvador now that Somoza had been overthrown and it was not so much needed by the Sandinistas?

A. I could allow for the possibility of that. I do not know it and I do not know that the investigation carried out in Costa Rica at that time or the information developed from that arms seizure made any connection with Nicaragua at all. I believe that one or two of the persons of this multinational group, which included a Chilean, an Argentine, several Costa Ricans, some Salvadorans, etc. — that one or two of these was of Nicaraguan nationality.

Q. Yes. I think that that is correct. Let us turn to 1983, Mr. MacMichael. I think this is also in the period of your service. A United States reporter named Sam Dillon visited a small Nicaraguan port, called La Concha, located about 60 kilometres across the Gulf of Fonseca from El Salvador. In his story in the

Washington Post — a newspaper, I might note, which is known for its frequent criticism of the Reagan Administration — which appeared on 21 September 1983, at page A29, he recorded that:

> "A radio-equipped warehouse and boat facility, disguised as a fishing co-operative on an island in northwestern Nicaragua, has served for three years as a transshipment point for smuggling arms to El Salvador, numerous residents here say."

Do you think, Mr. Dillon reported false information?

A. No, I would have no quarrel with the information that Mr. Dillon reported. I have read that article. I could comment upon it; I would reply to it more accurately if I had a copy in front of me but if that is not possible I will point out a number of things about it. One that raises a great many questions, as a careful reading of the article will indicate — one of these is raised merely by the headline, but even before I go into that, what I will say is that it always surprises me to some extent when the United States Government, in attempting to make its case on this point, so flagrantly delivers as evidence statements in the public press, when one would hope they would have something more substantial to put forward. This is not at all to impeach the *Washington Post* or Mr. Sam Dillon or newspapers. The headline of course is misleading; because it simply states as a fact that an arms shipment point has been raided. It states that it was raided by forces of the Nicaraguan Democratic Front, the FDN, when subsequent evidence has informed us that it was carried out by agents working directly for the Central Intelligence Agency, that is, so-called unilaterally controlled Latin assets. Reference in this story is also made to the press statement issued by the FDN about this. In my own conversations several months ago with Mr. Edgar Chamorro we talked about this; he pointed out that the press statement, which allegedly came from the FDN, was one that had been prepared within the Central Intelligence Agency and handed to him to present as if it were supposed to have been — and I will make a general observation here, if I may — as if this was supposed to have been a major transshipment point for arms within Nicaragua and going to El Salvador, and had been identified by the competent intelligence authorities of the United States. Given the scepticism that had been raised for some time and the demand for hard evidence, in the form of arms seizures, within the United States to support this case, it seems to me — as it seemed to me when I first became aware of that — that the goal would have been to gain as much presentable evidence in the form of photographs, in the form of tracking boats leaving that place to El Salvador, of seizing arms shipments, of taking prisoners, and so forth. Not to send a force in to destroy the entire facility, leaving behind the following items — if I recall the article correctly — a Nicaraguan army banner — I believe is described there — which if it were a clandestine installation, is a surprising item to have there.

Secondly, a target which had been fired at and shell casings which presumably came from the weapons which had fired at the target, the remains of three long wooden crates, was the entire physical evidence left behind. If this was indeed a super-secret facility, it is also puzzling, although it may simply indicate a great deal of confusion with the Nicaraguan Government, that western reporters were allowed free access to this site immediately, that they spoke without hindrance to people living in the area and that there was only present one person described as a shotgun-toting guard, who does not appear to have been a member of the Nicaraguan armed forces. There is a further statement within the article that on, at least, the basis of conversations with local residents, some years previously, shortly after the events of July 1979, that military men not further described came to the area seeking the services of experienced smugglers and the experienced smuggler was named in the article. I cannot unfortunately recall the name now. All this, to me, raises a great deal of questions — what was this facility? The statements made by people living in the surrounding area, such as "I don't mix in politics but everybody knows" — this is what they said — may, or may not, be valid statements. And I do not want to be in a position, your Honour, of trying to explain away everything I see, but that is my job, to examine this sort of thing, and say why there are so many questions coming out of this. That is the only response I can make to your bringing this article up at this time.

Judge SCHWEBEL: I might read out what was said in the Declaration of Intervention of El Salvador on this point, with particular regard to it being a super-secret facility of any sophistication.

> "In late 1983 a United States reporter named Sam Dillon visited a small Nicaraguan port, called La Concha, located about 60 kilometres across the Gulf of Fonseca, from El Salvador. Mr. Dillon reported that the residents of the so-called fishing co-operative had, as traditional smugglers, introduced, since 1979, large quantities of weapons into El Salvador under instructions of the Nicaraguan Government."

That is the perception of the Government of El Salvador of these events.

Mr. MacMICHAEL: That is their perception, yes.

Judge SCHWEBEL: Mr. MacMichael, the *New York Times* of 13 July 1984 carried a story of an interview with a former Salvadoran guerrilla commander who was captured in Honduras, who stated that virtually all the arms received by rebel units he led came from Nicaragua, and that Salvadoran guerrillas have their headquarters in Nicaragua. The name of the former guerrilla is Arquimedes Canadas also known as Commander Alejandro Montenegro. Have you any comment on that story?

Mr. MacMICHAEL: Yes, your Honour, I do. I would like to point out that as in the case of any statement made by a prisoner or defector I am not in any way in a position to directly impeach the statement. I simply want to point out, as I did earlier in my testimony, that a heavy reliance on the sort of testimony of people being held, as in the case of Arquimedes Canadas, better known as Commander Alejandro Montenegro, who, incidentally, was a very successful FMLN commander, — he led an attack on the Ilopango airfield in 1982 and destroyed much of what was then the Salvadoran air force. He was captured in August 1982 in a safe house in Tegucigalpa in Honduras. I was aware of his capture and had access to the results of his initial interrogations. At that time he made no mention of arms. Indeed, I could say certainly that the object of much of his interrogation had to do with his leadership of the raid on the Ilopango airfield; where he received his training, and so forth.

Q.: Where was that? Where did he receive his training?

A.: He testified that he received it in Cuba. Earlier in 1982 this gentleman had met with western reporters in the field in El Salvador and stated, at that time, that the vast majority of the arms used by his force were arms that were either purchased on the black market or captured in combat in El Salvador. When he made his statements reported in July 1984, almost two years after his capture, during which time he had been in the hands of very skilled interrogators, he told a very different story. Now, which story is correct I am in no way able to judge, and I have testified to a certain point and I am raising questions that will tend to support my point of view, and I am not trying to explain away everything you advance.

Q.: Fair enough. Now you spoke before of that famous incident in which the United States came forward with a defector who was introduced as someone who would testify to Nicaraguan support for the Salvadoran insurgency and, in fact, he did not, and he testified, in fact, that it was not so, and that he was put up to saying so, and so on. Is that correct?

A.: That is true.

Q.: What became of that gentleman may I ask?

A.: He is, to my knowledge, in Nicaragua today.

Q.: I see. He wasn't shot on the spot? He showed no signs of torture? He walked away as a free man? He was in Nicaragua, welcomed as a hero. Is that not correct?

A.: I do not know, your Honour, as to whether he showed any signs of torture. I had no chance to examine him physically. I will accept and glory in the fact, as you do too, that people who appear in the custody of the United States Government, in the United States of America, under guarantees given by that Government, find those guarantees respected and in his case they were.

Q.: Right, now given his example, do you see any reason why a defector from the Salvadoran insurgency should fear to speak the truth? They can well see that if they come out with a story contrary to that which one would suppose the United States would want to hear, a hero's welcome would await them in Nicaragua. So why wouldn't they speak the truth?

A.: Well, we haven't referred to any other Nicaraguan captives or defectors here. The persons about whom we have been talking were, I thought, Salvadorans who had left the FMLN.

Q.: Yes. But as you know there are a large number of such defectors both from Salvadoran and Nicaraguan sources whose testimony is similar to that of the nature I have cited to you. I could go on and on giving you examples like this, but I do not think we can take the time of the Court. My point is simply, that, is not this single example of the treatment of that single captive suggestive of the fact that persons in the custody of the United States need not fear to speak the truth as they know it? Would that not be the lesson you would draw if you were in a similar situation?

A.: I certainly believe that is the case.

Judge **SCHWEBEL**: That concludes my questions, Mr. President.

The **PRESIDENT**: At the moment there are no questions to be put to you. After the coffee break, if there are any questions, I hope you will be available to the Court to answer questions.

Mr. **MacMICHAEL**: I am, Sir, available to the Court as long as it wants me, your Honour.

The Court adjourned from 4.40 to 4.55 p.m.

EVIDENCE OF PROFESSOR GLENNON

WITNESS CALLED BY THE GOVERNMENT OF NICARAGUA

The **PRESIDENT** : For the moment there are no further questions for the second witness so we may summon the third witness, that is Professor Glennon.

Mr. **ARGÜELLO GOMEZ** : Yes, Mr. President, the next witness will be Professor Michael Glennon. He will be examined by Mr. Paul Reichler.

Mr. **REICHLER** : Mr. President, Members of the Court, may it please the Court, my task is to ask the questions of this witness. I would like to ask the witness first if he will please make the solemn declaration.

Professor **GLENNON** : I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth.

Q. Would you please state your full name?

A. My name is Michael John Glennon.

Q. Where do you reside?

A. I live at 3455 Cornell Place, Cincinnati, Ohio.

Q. What is your nationality?

A. I am a citizen of the United States of America.

Q. How are you presently employed?

A. I am an adjunct professor of law at the New York University Law School and a full professor of law at the University of Cincinnati College of Law.

Q. When did you become a professor of law?

A. I became an adjunct professor at the New York University Law School in 1977. I became a professor at the University of Cincinnati College of Law in 1981.

Q. When and where did you obtain your law degree?

A. I was graduated from the University of Minnesota Law School in 1973.

Q. In your academic work, do you specialize in any particular area or areas of the law?

A. I teach international law and constitutional law. My speciality is the constitutional aspects of the United States foreign relations power; specifically, the distribution of power between the President and the Congress in areas such as treaty-making and the war power.

Q. Have you published books or articles or received honours in this area?

A. I have published a number of articles in these fields. I have also received several honours; in 1981, I co-authored a five-volume work entitled *United States Foreign Relations Law* with Professor Thomas M. Franck of the New York University Law School. That work was awarded the Certificate of Merit by the American Society of International Law. In Spring of this year, 1985, I was awarded the Deak Prize by the American Society of International Law for the best article by a younger author to appear in the *American Journal of International Law* over the previous year. The article concerned the war-powers resolution and the effectiveness and constitutionality of statutory limitations on the President's war-making power.

Q.: Are you active in any professional organizations?

A.: Yes, I am active in the American Society of International Law. I was appointed to a committee of the American Society of International Law to study the jurisdiction of the International Court of Justice, specifically whether the United States should modify or terminate its declaration accepting ICJ jurisdiction and, if so, how constitutionally that is required to be done. I am also a member of a panel of the International Law Association (the American branch) set up to study the use of force in relations among States.

Q.: What previous professional employment have you had and what were the time periods?

A.: From 1973 to 1977 I was assistant counsel in the office of the Legislative Counsel of the United States Senate. From 1977 to 1980, I was the Legal Counsel to the Committee on Foreign Relations of the United States Senate. From 1980 to 1981, I was associated with a law firm in Washington, D.C., which practised international law, and from 1981 until the present I have been a professor of law at the University of Cincinnati College of Law.

Q.: When you worked in the United States Senate Legislative Counsel's office, what were your responsibilities?

A.: The office of the Legislative Counsel is something of the nature of an in-house law firm. It does legal work for the Senate, Senators and Senate committees. I was assigned to the Senate Foreign Relations Committee, which had no counsel on its staff at the time. All of its legal work was given to the office of the Legislative Counsel and assigned to me. That work included answering the Committee's inquiries on matters of international law, constitutional law, statutory interpretation and particularly statutory drafting.

Q.: What were your responsibilities when you were the legal counsel to the Committee on Foreign Relations of the United States Senate?

A.: While I was the Committee's legal counsel I was responsible as the principal lawyer for the Committee for matters involving international law, constitutional law and statutory interpretation. I did such things as help set up hearings for the Committee; I put together lists of witnesses; I suggested questions for the senators to ask witnesses; I drafted legislation that the Committee requested concerning matters on which the committee concluded that some new law was necessary; and in general I was responsible for answering the Committee's questions on all the legal matters before it. In addition to my responsibilities as the legal counsel to the full Committee, I was also assigned to the staff of the Committee's Subcommittee on International Operations. The Subcommittee on International Operations was charged expressly with oversight of the State Department. As a member of that subcommittee staff I was responsible for determining whether the Department of State was operating within the bounds of the law and in that capacity met regularly with State Department officials and frequently interviewed them with a transcriber present. I reported my findings to the subcommittee and made recommendations concerning how the law needed to be changed in instances where it did.

Q.: Did you have occasion in the early part of this year to conduct a fact-finding mission in Nicaragua?

A.: I did, yes.

Q.: On whose behalf did you conduct this fact-finding mission?

A.: The mission was sponsored by the International Human Rights Law Group and the Washington Office on Latin America.

Q. What is the International Human Rights Law Group?

A. The International Human Rights Law Group is a private non-profit independent American organization which is comprised of prominent members of the Washington, D.C., Bar; the group is active in investigating human rights matters and human rights litigation.

Q. What is the other sponsoring organization, the Washington Office on Latin America?

A. The Washington Office on Latin America is also a private non-profit independent American organization, which is funded by church groups and foundations, including the Ford Foundation. It too is interested in human rights matters, specifically in the Central American region.

Q. What was the purpose of this fact-finding mission?

A. A number of reports had come to the attention of the two sponsoring organizations which had alleged serious abuses by the *contras* of the rights of civilians in Nicaragua. The sponsoring organizations asked us to go to Nicaragua and to determine the validity of these allegations. The sponsoring organizations also asked us to make some assessment of United States responsibility, if any, for the incidents described in these allegations.

Q. From what sources have the sponsoring organizations received information pertaining to the activities of the *contras*?

A. From a number of sources. They had a rather thick pile of newspaper clippings alleging *contra* abuses. They also had received about 140 signed sworn affidavits by Mr. Reed Brody, who was an Assistant Attorney General in New York and a member of the New York Bar. He had travelled to Nicaragua, spent four months in Nicaragua, and looked extensively into the alleged abuses of the *contras*. They also had allegations from groups such as Americas Watch and it was the feeling of these two sponsoring organizations that because the Congress was again presented by President Reagan with a request to fund the *contras*, before that decision was made by the Congress, in view of the paucity of evidence concerning the validity of these allegations, some methodical and purposeful investigation needed to take place.

Q. Who else besides yourself was a member of this delegation?

A. Mr. Donald T. Fox.

Q. What were Mr. Fox's qualifications for this work?

A. Mr. Fox is a senior partner in a New York law firm. He is a member of the International Commission of Jurists and as Vice-President is head of the American Branch. Mr. Fox has also been involved in human rights matters in the past. He conducted an on-site investigation of human rights abuses in Guatemala in 1979.

Q. Did anyone else accompany you on this mission?

A. Yes, the sponsoring organizations hired an interpreter, Dr. Valerie Miller, who was also accompanied by an observer from the office of Congressman Sam Gejdenson of Connecticut. Congressman Gejdenson is a member of the Sub-Committee of the House Foreign Affairs Committee with responsibility for Central America.

Q. Did the sponsoring organizations define for you the scope of your mission?

A. Yes, they did. They asked us first to look into the validity of the allegations that had been presented to them concerning abuses by the *contras* directed at the civilian population in Nicaragua. They also asked us to make some assessment of the responsibility, if any, of the United States Government for the activities of the *contras*.

Q.: Who decided on what methodology your delegation would use in conducting its investigation in Nicaragua?

A.: The methodology was determined exclusively by Donald Fox and myself.

Q.: Would you describe to the Court in general terms how you did conduct your inquires into the activities of the *contras* and the responsibility, if any, of the United States?

A.: Yes, with respect to the *contras*, we went to Nicaragua. We interviewed about 36 people who were located in the area of northern Nicaragua, along the border of Honduras, where the *contras* had been active and where a number of the alleged incidents were said to have occurred. In investigating these incidents we visited the towns of Esteli, La Estancia, Condega, Matagalpa and the capital city of Manuagua, of course. With respect to the responsibility of the Department of State, we met with officials from the Department of State in Washington before we left for Nicaragua. While we were in Nicaragua we met in Managua with the United States Ambassador to Nicaragua, Mr. Harry Burgold, and when we returned to Washington we met again with officials of the Department of State.

Q.: Who determined your itinerary in Nicaragua?

A.: Donald Fox and I determined our itinerary.

Q.: How did you decide on that itinerary?

A.: We asked the recommendations of a number of people before we left including officials of the Department of State and members of different human rights organizations, including Americas Watch. We also adjusted our itinerary along the way based on information that we gathered in the interviews.

Q.: Was the Nicaraguan Government involved in any way in planning or approving your itinerary?

A.: Absolutely not.

Q.: Did the Nicaraguan Government participate in or influence your inquiry in any way?

A.: It did not.

Q.: Did you receive any assistance from the Nicaraguan Government in the course of your investigations?

A.: Yes, we did. We determined that it was necessary to interview the captured head of *contra* intelligence from the Department of Nuevo Segovia who was at the time that we were in Nicaragua incarcerated in the Modelo prison in Tipitapa. We requested and received the permission of the Nicaraguan Government to interview this individual in the prison. I might add that we interviewed him by ourselves, without any representative of the Government being present. Second, we hired at market rates a car and a driver from the Nicaraguan Government, which we concluded, while we were in Washington, was the only practical means of getting about the country safely and seeing the people that we needed to see.

Q.: Who determined which people you would see and interview?

A.: Donald Fox and I determined whom we would see exclusively by ourselves.

Q.: Was the Nicaraguan Government involved in any way in your selection of these people?

A.: Absolutely not. As a matter of fact, we discovered at one point that an over-zealous contact person had sought and received the assistance of a local government official in locating the person that we wanted to talk to and because of this involvement of the Government we concluded that it would be best to exclude that individual's statement from our report.

Q.: How did you select the people whom you interviewed in the places you visited in Nicaragua?

A.: We selected the persons to be interviewed in several different ways. First, when we went to the different cities we frequently spoke to the priests who had parishes in those cities and we asked the priests whether any of their parishioners had had any experiences with the *contras* and, if so, whether these individuals would be credible. Second, we spoke to Americans who were living or had lived in Nicaragua and asked them whom we should talk to; these were frequently members of religious groups, such as Witnesses for Peace. Third, some of the interviews that we conducted created leads that led to other individuals that we believed we should interview. Finally, a number of people simply came to see us, having heard that we were in town, and having something to tell us.

Q.: Can you generally describe the people whom you interviewed?

A.: Yes, the people that we interviewed came from all walks of life. They were generally aged from about 20 to about 60. They were from a variety of different occupations — truck drivers, bus drivers, telephone technicians, coffee pickers, housewives. Many of them seemed to be Government supporters; some did not; most appeared apolitical. Most were devout Catholics.

Q.: Who actually conducted the interviews?

A.: Donald Fox and I conducted all the interviews ourselves. Normally we conducted the interviews together, although occasionally in the interest of time we split up and conducted the interviews separately.

Q.: Where were the interviews conducted?

A.: Generally the interviews were conducted in the houses, or more accurately, the huts of the people that we were interviewing.

Q.: Did any representative of the Nicaraguan Government participate in any of these inverviews?

A.: No.

Q.: How did you determine the veracity of the persons you interviewed?

A.: In several ways. We cross-examined people quite closely. We asked probing questions; we compared notes afterwards on our assessments of their demeanour and credibility. We asked the individuals if there were other witnesses to the events they described, and if possible we interviewed those persons. Finally, we cross-checked their stories, where possible, against whatever documentary sources were available.

Q.: Did you rely on any statements that were not first-hand accounts?

A.: We did not. We accepted only first-hand accounts and sought generally to adhere to American standards of evidence, which preclude the admission of hearsay.

Q.: Were there any witnesses whose veracity you doubted?

A.: Yes, there were two witnesses whose veracity we doubted. One was a middle-aged man who seemed to recall events in amazing detail. His story was plausible, but we thought that to be safe we should probably exclude it. Second, an 18-year-old girl described events in terms that we thought were exaggerated, and we therefore excluded her statement from our report as well.

Q.: So a report of your fact-finding mission was prepared?

A.: That is correct.

Q.: Who prepared the report?

A.: Donald Fox and I.

Q.: Was the report ever published?

A.: Yes, the report was published in April 1985 by our two sponsors.

Q.: And does your report have a title?

A.: Yes, it does.

Q.: Would you read it to us?

A.: The title is "Report of Donald T. Fox, Esquire, and Michael J. Glennon, to the International Human Rights Law Group in the Washington Office on Latin America concerning Abuses against Civilians by Counter-revolutionaries operating in Nicaragua, April 1985".

Q.: Since the report is already in evidence in this case at Annex I to Nicaragua's Memorial of 30 April 1985, I would like to ask you if you could very briefly recall for the Court your findings and conclusions as to the activities of the *contras*?

A.: With respect to the *contras*, our conclusions were as follows. We found that there is substantial credible evidence that the *contras* are engaged with some frequency in acts of terroristic violence directed at Nicaraguan civilians. These are individuals who have no connection with the war effort — persons with no economic, political or military significance. These are individuals who are not caught in cross-fire between Government and *contra* forces, but rather individuals who are deliberately targeted by the *contras* for acts of terror. We found that the *contras* do in addition target economic institutions such as coffee processing plants, lumber-yards, radio stations and the like, but we found, as I say, that there is substantial credible evidence that the *contras* with some frequency direct terroristic violence at Nicaraguan civilians.

Q.: You said that the *contras* engage in terroristic violence, in acts of terror. Can you tell the Court what you mean by terror?

A.: I use the term "terror" in the same sense in which it is used in the United States law, and I refer the Court's attention to Public Law 98-533, which was enacted only this year. It defines an act of terrorism as an activity that involves a violent act or an act dangerous to human life that is a violation of the criminal laws, and appears to be intended to intimidate or coerce a civilian population, to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by assassination or kidnapping. We found that those are precisely the kinds of activities in which the *contras* deliberately engage.

Q.: I know that your report makes reference to a number of incidents of what you have defined as acts of terror. Could you give the Court some very brief examples to illustrate what you mean?

A.: Yes, I would like to read for the Court the statements that we took from three individuals. These statements were made in their own words.

The first is Maria-Julia Ortiz, aged 28, whom we interviewed in Jalapa on 25 February 1985.

> "It was 24 October 1984 at Pied de la Cuesta, where I lived at the time. The *contras* came about 4.30 a.m. They banged on the door and said 'Get up you rabid dog'. My husband did not want to open the door. They broke it down with the butts of their rifles. My husband said 'I am ill'. The *contras* said 'That's not what we're asking you. If you don't get up we're going to throw a grenade in your house.' He was frightened. He knew what they were going to do to him because they had broken down the door. He had

> run into the other room. They hit him on the neck with a gun, knocking him unconscious. Then they took him into the corridor and tied him up. Then, while he was lying on the ground, they hit him on the eye. My children could see what was happening. I have three — four with the one now because I am pregnant. Then they took bayonets and slit his throat. I saw all of this from under the bed. After they slit his throat they said 'Where is this guy's wife?' While he lay there bleeding to death, my little girl said 'What's happening to daddy?' The *contra* then grabbed me and said 'Come with us', and tried to pull me from the children. When I resisted they hit me and I fell unconscious. When I woke up on my cot the *contras* were going through our belongings, taking what they wanted. When they finished, a *contra* who had been giving instructions from outside asked those inside 'Did you do what you were supposed to do?' "

We asked this woman why her husband had been killed. She did not know. "He never got involved in anything," she said, "he was a carpenter. He was not in adult education or anything like that." We asked whether he was a communist. "I don't know what they are," she said. "I am a Catholic. We went to mass every Sunday together."

Second is the statement of Maria Ramirez Mateo whom we interviewed in La Estancia.

> "I live in the co-operative Augusto Cesar Sandino, in Quilali in the municipality of Nueva Segovia. It's about three to four hours from here. On 18 December 1983 at about 9 o'clock in the morning, I was feeding my children, all six. I rounded them up when I heard shots. We took our kids to a shelter. I couldn't get all the other kids out. One woman was at the river washing and her two kids were killed. The *contras* killed them in their house. My mother was taking care of them and she was hit in the arm. The *contras* shot up the whole village and all the houses. They were inside one of the houses. The *contras* took a girl of about 15. They grabbed the 15 year old girl. The *contras* were shouting slogans — 'you rabid dogs, why are you running away?'. The girl was a militia, they grabbed her and took away her gun. She was in a special area that had been dug up. She was on one side and I was on the other side, about 30 yards away. She was screaming. She was raped by one of 50 men. There were about 800 *contras* there, in other areas. The same person then cut her throat with the bayonet that he had in his hand. When I saw her throat cut, I decided I should run away because they would do the same to me. I left for another co-operative. They shot at us but we went down into a gully and escaped. As we did, they began burning houses. About 17 of the 23 houses were burned. Twelve militia were killed, and two little girls. Among the 12 were my two brothers and my father. I remember it as if it happened yesterday. I have only one brother left. My brothers left their wives and children — 3 and 4 children — and they are now orphans. One feels great gratitude when people come and visit us. I want to thank you."

The next person whose statement I will read to the Court is that of Gustavo Adolpho Palaciss Reyes who is 25 years old. We interviewed him in La Estancia on 27 February 1985:

> "I am a day labourer. On 26 December 1984 we were in Sompopera. We were on the road about 6 o'clock in the morning in a Ford pick-up truck, a private pick-up truck. In it were my mother, wife and three family members of my wife's family. None had guns. We heard machine gun fire. We stopped.

> It continued for 15 to 20 minutes. It was aimed at the truck. We couldn't see who it was. We all ducked down. When the shooting stopped, they came up to the vehicle. They had a badge on their uniforms that said 'FDN', the uniforms were blue. There were 50 to 80 men. They saw we were six women and four men. They said nothing, they just looked at the bodies. Six had been killed. Of the wounded, one later died. They said nothing. Then they left. My mother and my wife were killed. After the actions of these freedom fighters we got out of the vehicle and found a farm worker to get help. The car had no markings on it. It was a private vehicle of transportation. I just want to say that all this is a product of the help the United States Administration is giving to the *contras*. I am not a communist. I am a catholic. I hope these words will do something back in the United States. We just want to live in peace."

Q.: What conclusions did you draw about the extent or frequency of acts of terror by the *contras*?

A.: We concluded that acts of terror occur with some frequency, that they are not isolated incidents. In the period of about one week that we were in Nicaragua, we heard related to us incidents involving 16 murders, 3 cases of torture, 44 kidnappings and one rape. We had the distinct sense that had we stayed longer and sought further evidence, we could have gathered substantial further evidence with little difficulty. In addition, it appeared reasonable to infer that the *contras* were operating pursuant to a command structure. The *contras* moved about the countryside frequently in groups of up to several hundred. The individuals who committed acts of terror against civilians were not acting, it seemed to us, as free agents, they were not acting beyond the course and scope of their duties; rather they appeared to be acting pursuant to direction and supervision. Finally, we interviewed a cross-sample of the individuals who had given statements to other investigators, such as Mr. Reid Brody, and those statements checked out, from which we thought it reasonable to infer that, had we interviewed others of the individuals who also had been interviewed by these persons, those statements would likely have checked out. Consequently, our finding was that acts of terror are not isolated incidents but rather occur with some frequency.

Q.: In your interviews with officials of the State Department and with United States Ambassador Harry Bergold in Managua, did you inquire whether the United States Government had ever conducted its own investigation of the *contras*' activities?

A.: Yes we did and we were told that no such investigation had ever been conducted.

Q.: Did you find out why not?

A.: Yes we did. One of the individuals from the Department of State with whom we spoke, a high-ranking State Department official, spoke with us on the condition that his name not be made public; he asked us not to identify him. He was quite candid with us, I think. He said that the intelligence community had not been tasked to look into these activities, which is to say that the Central Intelligence Agency and other American intelligence services had not been affirmatively directed to undertake to assess the validity of any or all of the allegations that we were referring to.

Q.: Did this senior official tell you anything about the posture or position of the United States Government with respect to these activities?

A.: Yes, he summarized the position of the United States Government quite pithily. He said that the United States Government maintained a posture of "intentional ignorance" — those are his exact words.

Q.: Notwithstanding that posture, did you nevertheless in your meetings with State Department officials in Washington and with United States Ambassador Harry Burgold in Managua find that the United States was in fact aware of acts of terrorism committed by the *contras*?

A.: Yes, we found that the United States, specifically State Department officials, were aware of acts of terrorism by the *contras*. This same high ranking State Department official told us that it was clear that the level of atrocities was enormous. Those words "enormous" and "atrocities" were his words.

Q.: From this do you conclude anything about the responsibility of the United States Government for these acts?

A.: Yes, I conclude that the United States Government is responsible for these acts; if the United States Government provides assistance to the *contras* knowing full well what acts the *contras* will perform, my conclusion is that the United States Government is responsible. It is like giving a loaded pistol to a person whom you know intends to commit murder.

Mr. REICHLER: Mr. President, that concludes my questioning of the witness; the witness, of course, remains at the disposition of the Court.

QUESTIONS PUT TO PROFESSOR GLENNON BY JUDGE SCHWEBEL

Judge SCHWEBEL : Professor Glennon, I take it that in Nicaragua you were free to travel where you pleased and speak to whomever you wished ? Is that correct ?

Mr. GLENNON : That is correct, your Honour.

Q. Did you speak to figures who have been critical of Sandinistas, such as the Roman Catholic Cardinal ?

A. We did.

Q. Did your group investigate alleged violation of human rights by the Sandinistas such as the forced relocation of the Miskito Indians, the assassination by State security officials of opposition officials, notably Jorge Salazar, and the murder of Somoza's supporters who had been taken prisoner ?

A. Justice Schwebel, we regularly asked those persons we interviewed whether they were aware of human rights violations by the Government of Nicaragua and we received no statement that would not constitute hearsay concerning human rights abuses by the Sandinista Government. I would like to say that our sponsors defined the scope of our mission for us; they indicated to us that our primary focus was to be on human rights abuses by the *contras* and both Donald Fox and I believed that that focus was justified for several reasons. First, a number of groups including the Department of State and Americas Watch had already studied human rights violations by the Government of Nicaragua ; there was a fair amount of literature that already existed on that point. Second, the United States Government was not considering at the time giving assistance to the Government of Nicaragua ; the President had requested the Congress again to fund the *contras*, and the question was the question that our sponsors asked us to look into — what was the responsibility of the United States by virtue of that funding ? So I thought that our focus on violations by the *contras* was entirely justified.

Q. Wouldn't it be fair to say, Professor Glennon, that you were not tasked, to use the word you used before, to investigate human rights violations of the Sandinistas ?

A. Well, no, our sponsors did tell us to find out what we could about human rights violations by the Sandinistas but it was not the principal purpose of our visit.

Q. May I ask, Professor Glennon, did you interview officials of the Permanent Commission on Human Rights — I refer now not to the Commission set-up in mid-1980 by the Nicaraguan Government, but to the Commission which was founded in 1977 and which I understand has a distinguished record of protest of alleged violations of human rights, both by the Somoza régime and the Sandinista Government ?

A. Yes, we did.

Q. Now, I understand that you impute to the United States responsibility for violations of humanitarian law by the *contras* ?

A. That is right. I view the United States as responsible for the acts that are being carried out by the *contras*.

Q. You will have heard news reports about the kidnapping of the daughter of President Duarte of El Salvador after the murder of one of her guards; it was reported that she was pulled away by the hair. Presumably, you have also heard reports of the policy of the insurgents in El Salvador of kidnapping, or assassinating mayors of cities, some 20 of whom have indeed been kidnapped; and there have also been indications of murder of prisoners by El Salvador insurgents — not early in the insurgency but later — and, of course, there is the attack on United States Marines and Salvadoran citizens at an outdoor café which has been referred to in these hearings. Now a leading figure of the insurgents in El Salvador, Mr. Ruben Zamora, is quoted in the *International Herald Tribune* of 14-15 September on page 3, as denying any knowledge of who had carried out the kidnapping of the Duarte daughter, a denial, incidentally, which he issued from Managua. But, as far as I know, there is no dispute about the attribution of these other actions to El Salvadoran insurgents. Now let us put aside for the time being the question of what is, or has been, the policy or practice of the Nicaraguan Government in regard to support of the insurgency in El Salvador; and let us assume, for the purpose of this question, two facts. First, that the leadership of the El Salvadoran insurgents operates from Nicaragua; and second, that arms have been shipped through Nicaragua to Salvadoran insurgents. If these facts are assumed, wouldn't it follow that Nicaragua is responsible for the violations of humanitarian law to which I have referred?

A. I really do not feel competent to answer that question. I have no specific first-hand knowledge of events in El Salvador; the knowledge that I possess, which has brought me here to this Court, is as a result of a visit to Nicaragua. I would be glad to answer any questions you may have about information we found in Nicaragua, but I really do not feel competent to answer questions about El Salvador.

Q. Well, I guess I am questioning you in your capacity as a professor of law, and assuming — as I am sure is the correct assumption — that you have knowledge of the principles of State responsibility and imputability. I am asking you not to speak of the facts of what has occurred in El Salvador; I recognize that is not within the focus of your mission. But I am rather asking you, on the assumption of certain facts, would it follow that, by reason of Nicaragua's aiding — and that is the assumption — of the insurgents in El Salvador, it is responsible for their violation of human rights? Would that follow?

A. Judge Schwebel, we did not include in our study an analysis of the issues of State responsibility and imputability as part of our mission. Ours was a fact-finding mission and I really would prefer not to comment beyond that.

Q. May I ask you how you can conclude, if you have not considered questions of imputability, that the United States is responsible for violations of human rights by the *contras*?

A. Because the sponsors of our mission asked us to study moral imputability as well as legal imputability. We set out Article 3 of the 1949 Geneva Conventions in our report, but as you can see from our report we did not get into the legal issues. I stand fully behind my conclusion that the United States is responsible for the actions of the *contras*. I think we meant that primarily in a moral sense, but as I say our mission was directed to finding facts and I am convinced that those facts are solid.

The Court rose at 5.45 p.m.

TWENTIETH PUBLIC SITTING (17 IX 85, 10 a.m.)

Present: [See sitting of 12 IX 85.]

EVIDENCE OF FATHER LOISON

WITNESS CALLED BY THE GOVERNMENT OF NICARAGUA

The **PRESIDENT**: We continue this morning with the examination of further witnesses, and I have asked the Agent of Nicaragua to have the fourth witness examined.

Mr. **ARGÜELLO GOMEZ**: In that case, Mr. President, I would request we call Father Jean Loison, the next witness, and he will be examined by Professor Pellet.

The **PRESIDENT**: Please summon the fourth witness, Father Jean Loison.

M. **PELLET** : Avant de poser quelques questions au témoin avec votre autorisation, je pense qu'il doit faire la déclaration prévue à l'article 64 du Règlement.

Père **LOISON** : *Je déclare solennellement en tout honneur et en toute conscience que je dirai la vérité, toute la vérité et rien que la vérité.*

Q. : Monsieur, auriez-vous l'obligeance d'indiquer à la Cour votre nom, votre prénom, votre nationalité, la date et le lieu de votre naissance ?

R. : Je m'appelle Jean Loison. Je suis français, né le 19 janvier 1931 à Orléans en France.

Q. : Quelles sont les fonctions que vous exercez actuellement ?

R. : Les fonctions que j'exerce actuellement : depuis bientôt trente ans je suis prêtre catholique, et depuis une quinzaine d'années je suis également infirmier. Pour préciser, depuis deux ans je suis professeur dans une école qui forme des infirmières et des infirmiers.

Q. : Quand avez-vous été ordonné prêtre de l'église catholique ?

R. : En 1956 à Orléans.

Q. : Vous avez aussi des diplômes d'infirmier ?

R. : Oui. J'ai le diplôme d'infirmier que j'ai passé d'abord en Argentine, ensuite, en Argentine aussi, j'ai passé la licence de soins infirmiers. Ensuite j'ai passé en France le diplôme d'infirmier et ensuite fait l'école des cadres infirmiers.

Q. : Pourriez-vous indiquer à la Cour, Monsieur l'abbé, ce que vous avez fait après votre ordination ?

R. : Après mon ordination, j'ai été dans un collège catholique de la ville d'Orléans.

Q. : Et combien de temps êtes-vous resté dans cette institution religieuse ?

R. : J'y suis resté neuf ans.

Q. : Et qu'avez-vous fait après Orléans ?

R. : Ce que j'ai fait aussitôt après ces neuf ans ? Ce n'est pas à Orléans, c'est

à Lyon. Je suis parti un an faire une sorte de stage — année passée dans la société des prêtres du Prado. C'est un groupe de prêtres. Je suis du clergé séculier ; mais à l'intérieur du clergé séculier il y a certaines familles au point de vue affinités, et moi j'appartiens à la société des prêtres du Prado. C'est une famille sacerdotale qui est plutôt orientée vers les milieux plus défavorisés, vers les milieux pauvres.

Q. — Après ce séjour passé à Lyon, qu'avez-vous fait ?

R. — Après ce séjour-là, je suis parti en Amérique latine, en Argentine.

Q. — Quelles sont les raisons qui vous ont poussé à vous expatrier en Argentine ?

R. — Les raisons ? C'est un peu long. J'avais déjà 35-36 ans, j'avais donc dix ans de sacerdoce et j'étais assez attiré par cette phrase de l'Évangile, ce texte de saint Matthieu au chapitre 25, qui dit que nous serons jugés sur l'amour, l'amour que nous aurons les uns envers les autres. Il y a une phrase qui dit : « J'ai eu faim, vous m'avez donné à manger. » C'est Jésus qui dit cela : « J'étais malade et vous vous êtes occupés de moi. J'étais prisonnier et vous êtes venus me visiter. » J'ai été attiré par cette phrase-là et je me suis dit : « Cela fait déjà dix ans que je suis prêtre et j'ai beaucoup parlé mais peu agi. » À ce même moment j'étais dans un collège, comme je l'ai dit, et mes élèves me disaient : « Ah, vous nous parlez toujours du tiers monde, vous nous parlez toujours des pays sous-développés, mais pourquoi vous n'y allez pas vous-même ? » Alors, cela a été pour moi comme une invitation : « ce que je pense déjà est dans l'Évangile ; c'est la même chose. Mes élèves me voient partir. Pourquoi ne mettrais-je pas en pratique ce que je pense ? » Dans les mêmes moments, le pape Jean XXIII avait demandé qu'il y ait des prêtres occidentaux d'Italie, d'Espagne, de France qui partent en Amérique latine pour aider le clergé qui était insuffisant. Je me souviens très bien avoir lu dans le journal *La Croix* cet appel de Jean XXIII ; je suis allé quelques heures plus tard voir mon évêque, l'évêque d'Orléans, et je lui ai dit : « C'est comme vous voulez. Si vous voulez répondre à cet appel de Jean XXIII, si vous voulez envoyer des prêtres en Amérique latine, je suis volontaire. » Il m'a dit : « D'accord, dans deux ans, à cette époque-là, je vous y enverrai. »

Q. — Y avait-il des raisons particulières pour que vous alliez en Amérique latine, d'une part, et en Argentine plus particulièrement ?

R. — En Amérique latine ? C'est simplement parce que le pape Jean XXIII le demandait. En Argentine ? J'étais volontaire pour n'importe quel pays d'Amérique latine et c'est mon évêque qui m'a dit : « C'est bien de partir mais il faut aussi penser au côté humain. Ce ne serait pas normal que vous partiez dans n'importe quel pays. Il y a déjà un prêtre de votre diocèse qui est, depuis deux ans, en Argentine. Ce serait mieux d'aller faire équipe avec lui. » Et c'est pourquoi cela a été l'Argentine.

Q. — Monsieur l'abbé, combien de temps êtes-vous resté en Argentine et qu'avez-vous fait pendant cette période ?

R. — J'y suis resté dix ans. J'étais prêtre d'abord dans une paroisse de la banlieue de Buenos Aires. Très rapidement, je me suis aperçu que le clergé dans cette banlieue de Buenos Aires, une banlieue où tout le monde était baptisé mais où il y avait beaucoup de déchristianisation, était très coupé de cette population. Je suis allé voir l'évêque d'Avellaneda, dans la banlieue même de Buenos Aires, et lui ai demandé la permission d'apprendre un métier pour pouvoir m'approcher davantage des gens. Il m'a dit : « Oui, si vous le voulez. » Je suis allé alors à l'Université de Buenos Aires où j'ai passé le diplôme d'infirmier. Après avoir obtenu le diplôme d'infirmier, j'ai continué d'être prêtre dans une paroisse et, en même temps, je travaillais de sept heures du matin jusqu'à deux heures de l'après-midi. J'étais infirmier dans un hôpital de Buenos Aires. L'après-midi j'allais à la paroisse, de même que pendant les jours où je ne travaillais pas.

Q. Vous nous avez dit que vous étiez resté dix ans en Argentine, quand avez-vous quitté ce pays ?

R. J'ai quitté le pays à la fin du mois de février 1976.

Q. Pour quelle raison ?

R. Parce que mon père était gravement malade, mais il faut dire que mon père n'avait jamais été d'accord pour que je parte en Amérique latine. Il m'avait dit : « Tu ne seras jamais là, je suis sûr que tu ne seras pas là pour mes derniers moments », alors je me suis dit que je voulais absolument être là au moment où la maladie pourrait s'aggraver. Aussi quand ma famille m'a téléphoné et m'a demandé de revenir, ou tout au moins m'a proposé de revenir, j'ai dit oui tout de suite. Malheureusement je suis arrivé quelques heures après sa mort. Et puis, les prêtres français qui partaient en Amérique latine avaient des contrats de cinq ans, et pour moi ça faisait dix ans, donc j'étais à la fin du deuxième contrat de cinq ans et, à quelques mois près, c'était l'époque à laquelle je devais revenir.

Q. Donc vous êtes resté en France ?

R. Oui, je suis resté en France.

Q. Combien de temps êtes-vous resté en France après votre retour d'Argentine ?

R. Après mon retour d'Argentine, je suis resté sept ans en France.

Q. Bien, qu'avez-vous fait pendant cette période de sept années que vous avez passée en France ?

R. Exactement la même chose qu'en Argentine, c'est-à-dire que j'étais prêtre dans une paroisse, la paroisse de Briare à 70 kilomètres à l'est d'Orléans, et j'allais cinq jours par semaine, huit heures par jour à l'hôpital de Gien, à 10 kilomètres de là, où j'étais infirmier.

Q. Bien, vous avez de nouveau quitté la France après sept ans. Où vous êtes-vous installé ?

R. Je me suis installé au Nicaragua.

Q. Pourquoi avez-vous choisi le Nicaragua ?

R. C'est parce que j'étais en France quand est revenu un prêtre de Blois que je connaissais, un prêtre qui revenait du Nicaragua où il travaillait ; il était à ce moment-là en vacances et c'est comme cela que je l'ai rencontré. Il m'a dit : « Après une expérience de dix ans en Amérique latine, comment toi qui es prêtre et infirmier, qui as des diplômes, comment ! tu vas rester en France alors que tu sais bien qu'en Europe il n'y a pas tellement de besoins, pendant qu'en Amérique latine il y a beaucoup de besoins, et moi, qui suis au Nicaragua, je peux t'affirmer qu'on a besoin de cadres et certainement de cadres infirmiers dans ta profession. » Alors à ce moment-là, j'ai dit : « Je vais voir. » C'était en février. Je n'ai pas donné de réponse, je n'avais pas de réponse à lui donner mais je lui ai dit qu'au mois d'août, pendant mes vacances, j'irai au Nicaragua pendant trois semaines pour voir si ça vaut le coup, pour tâter un peu le terrain, je n'avais pas envie de m'embarquer comme ça à l'aveuglette. Alors c'est comme ça que j'ai passé trois semaines au Nicaragua au mois d'août 1982.

Q. Lorsque vous êtes parti au Nicaragua était-ce avec l'accord des autorités ecclésiastiques françaises ?

R. Bien sûr, oui. J'avais l'accord de mon évêque, Monseigneur Picandet, l'évêque actuel d'Orléans. J'avais l'accord aussi de mes supérieurs et de mes amis de la société des prêtres du Prado de Lyon. J'avais également l'accord de Monseigneur Deroubaix, l'actuel évêque de Saint-Denis près de Paris, et c'est lui qui est le délégué de la conférence épiscopale française pour tous les prêtres et toutes les religieuses qui travaillent en Amérique latine.

Q. Monsieur l'abbé, appartenez-vous à une organisation politique?

R. Non.

Q. Monsieur l'abbé, lorsque vous êtes parti au Nicaragua, à quel endroit vous êtes-vous précisément fixé dans ce pays?

R. Je me suis fixé à La Trinidad, c'est une petite ville à 25 kilomètres d'Estelí.

M. PELLET: Peut-être que le plus commode serait que vous indiquiez à la Cour où se trouve Estelí; sur la carte qui est derrière vous.

Père **LOISON:** Là c'est tout le Nicaragua; ici c'est la capitale Managua; Estelí est ici sur la route de Managua à Estelí, à 25 kilomètres avant d'y arriver se trouve La Trinidad, ici.

Q. Pourquoi vous êtes-vous fixé dans cette ville de La Trinidad?

R. C'est tout simplement parce que j'y avais passé trois semaines en 1982, au mois d'août. Pendant que je parcourais le pays, je suis allé à Estelí et comme j'étais infirmier je me suis rendu à la DASS, comment dire, le ministère de la santé au point de vue régional, et là j'ai rencontré la responsable infirmière pour toute la région. Elle m'a dit un peu la même chose que mon ami que j'avais vu un an auparavant ou quelques mois auparavant: « Il y a des gens comme vous, vous avez la licence en Argentine, vous êtes en train de faire l'école des cadres en France, eh bien, ce serait dommage que vous ne reveniez pas ici dans cette région! A La Trinidad il y a une école qui forme des infirmiers et infirmières dits universitaires et donc votre place est tout à fait là. » Alors cela m'a fait réfléchir, et puis je lui ai dit oui. Après je suis parti en France pendant un an mais je me suis préparé à cette fonction à laquelle j'étais destiné.

Q. Pourriez-vous décrire à la Cour les activités qui sont les vôtres à l'heure actuelle au Nicaragua?

R. Je suis donc dans une école à La Trinidad qui forme des infirmières et des infirmiers. Je donne des cours théoriques, si on peut dire, j'enseigne l'anatomie, la physiologie, la nutrition, la pharmacologie; ça c'est la partie théorique. Au point de vue pratique, je vais aussi à l'hôpital, qui est tout à côté, pour m'occuper des élèves. Je ne soigne pas directement, si, un petit peu si vous voulez, mais principalement mon rôle c'est de former les élèves et donc plutôt de faire soigner que de soigner.

Q. Combien d'étudiants formez-vous chaque année?

R. Je m'occupe cette année des « première année », ils sont entre vingt et vingt-cinq. Je m'occupe de la théorie et de la pratique pour les première année et, pour les deuxième année, un groupe de vingt-cinq environ, simplement de la théorie.

Q. L'école d'infirmiers dans laquelle vous exercez est rattachée à un hôpital, pourriez-vous nous indiquer quelle est la nature des soins qui sont dispensés dans cet hôpital et le genre de patients que vous êtes amené à soigner?

R. C'est un hôpital chirurgical. Donc, ce sont tous des patients qui ont besoin d'être opérés. Ou tout au moins qui sont opérables. Je crois qu'on y voit des opérations d'appendicite ou de vésicule biliaire, si vous voulez, toutes les opérations banales. Et puis toutes les opérations qui relèvent de la guerre, alors là, je pourrais citer des cas infinis, des cas d'amputation, par exemple des mains, des jambes; la mâchoire éclatée; aussi, il n'y a pas très longtemps, un monsieur qui avait les testicules éclatés; une dame dont on voyait tout l'abdomen et qui était enceinte d'un certain nombre de semaines et j'ai vu l'enfant déchiqueté. Alors ce sont des blessures de guerre sur ce genre de patients; il faudrait ajouter aussi que ce genre de patients ce sont tous ceux qui n'ont rien à voir avec la guerre mais il y a aussi tous ceux qui ont à voir quelque chose avec la guerre, là je pense aux militaires, aux civils qui défendent leur coopérative, leur lieu de travail. Je crois même que ce sont les plus touchés, les plus visés par la contre-révolution. Et puis, il y a aussi tous ceux qui sont sans défense. Je me souviens, il y a quinze jours (je suis sûr qu'elle est encore à l'hôpital), d'une petite Martha de sept ans qui a reçu une balle dans le coude gauche. Je pense aussi à Maria Lucia, une petite fille de cinq ans : la pauvre était à l'hôpital avec sa mère ; je me souviens que mes élèves avaient fait la quête pour cette petite Maria Lucia et pour sa mère, qui avait perdu ses quatre frères et sœurs qui avaient été tués dans une attaque à San Gregorio à 20 kilomètres de Quilali. Si vous voulez, Esteli est ici et j'ai eu l'occasion de parcourir la région qui est là, à l'est et au nord-est d'Esteli. C'est dans cette région que la petite Maria Lucia a été blessée. Je me souviens aussi d'une dame d'une quarantaine d'années, du côté d'Ocotal : elle marchait dans un chemin et quelqu'un a sauté sur une mine, et elle-même, qui était à quelques mètres de là, a reçu des éclats d'obus sur tout le côté gauche du corps et dans la vessie ; je me souviens l'avoir soignée.

Q : Monsieur l'abbé, en dehors de votre travail d'infirmier, d'une part, et de professeur, d'autre part, avez-vous l'occasion de vous déplacer dans la région de La Trinidad ?

R : Oui, je me suis déplacé dans la région de La Trinidad.

Q : En quelles occasions ?

R : J'habite La Trinidad et je connais un peu les alentours de La Trinidad. Je gravis la montagne de temps en temps. J'aime bien le sport et il y a quelques communautés qui sont là, tout à côté de La Trinidad. Mais je suis allé à Ocotal aussi. Et à Esteli — j'habite Esteli —, le samedi et le dimanche, je vais voir des amis. Autour d'Esteli, j'ai eu l'occasion de voyager, comme autour de La Trinidad et un peu plus loin, ici, à Ocotal, j'ai passé toute une semaine avec un prêtre de mes amis, je l'aidais. Et puis dans cette région, ici, du côté de San Juan del Rio Coco, j'ai passé plusieurs semaines à la cueillette du café. Et plus loin, ici, la région de Quilali est la région dans laquelle je suis allé plusieurs fois parce qu'au Nicaragua il y a des campagnes de vaccination trois fois par an et, comme je suis au Nicaragua depuis deux ans, j'ai participé six fois à des campagnes de vaccination ; chaque fois nous partons avec les élèves pendant deux ou trois jours. Six fois donc, je suis allé deux ou trois jours dans toute la région d'Esteli, en particulier dans la région de Quilali que, finalement, je commence à connaître.

Q : Bien. Cette région que vous commencez à connaître, auriez-vous, Monsieur l'abbé, l'obligeance d'indiquer à la Cour quelles sont ses caractéristiques du point de vue à la fois géographique, économique et en ce qui concerne son peuplement ?

R : Oui. D'un point de vue géographique, c'est une région montagneuse, avec de belles vallées. Mais il faut dire aussi que c'est une région, comme on peut le voir sur la carte, tout près du Honduras. J'ai calculé plusieurs fois : Esteli est à peu près à 50 kilomètres du Honduras à vol d'oiseau ; par la route, elle est à 80 ou 90 kilomètres. Maintenant, d'un point de vue économique, un peu avant d'arriver à Ocotal, c'est la plaine de Sébaco, une plaine très fertile où l'on cultive du riz. A partir de La Trinidad, et plus au nord à Esteli, et à l'est, on trouve de belles cultures de maïs, des cultures de haricots rouges ; à l'est, dans la région d'Esteli, beaucoup de cultures de pommes de terre aussi. Puis, surtout, comme je l'ai évoqué tout à l'heure, on trouve dans le nord beaucoup de café : c'est une région importante pour la culture du café. Il y a aussi beaucoup de bétail.

Q. En ce qui concerne le peuplement ?

R. La ville où j'habite, La Trinidad, compte 8000 habitants environ, un peu comme la ville de Quilalí que j'ai citée. La ville d'Ocotal, peut-être 20 000 habitants, et la capitale, Esteli, 40 000 habitants environ. Il faut parler aussi des paysans. Une partie est dispersée, mais, depuis quelques années, une autre partie est regroupée car, à cause de toutes les incursions de la *contra*, le gouvernement a voulu les protéger. Il y a donc maintenant un certain nombre de paysans regroupés dans des petits villages.

Q. Monsieur l'abbé, pourriez-vous décrire cette zone comme une zone d'opérations des *contras* ?

R. Du côté de La Trinidad, je ne peux pas dire que le danger est permanent ni dans la ville même d'Esteli, mais à l'est d'Esteli et au nord, c'est une zone qui est pour ainsi dire une zone permanente de danger.

Q. Monsieur l'abbé, pensez-vous être en mesure de répondre à des questions concernant les méthodes de combat de la *contra* ?

R. Oui, j'ai certains éléments qui me permettent de répondre.

Q. Quels sont ces éléments ou plus précisément quelle connaissance avez-vous de ces méthodes ?

R. J'ai des connaissances par les blessures que je vois tous les jours. Par les blessés qui me racontent un peu ce que sont ces méthodes. Et aussi par les réfugiés. Il y a un mois et demi environ, il y avait des réfugiés à Llano Largo, une petite communauté à l'est de La Trinidad ; il y a eu aussi quatre-vingts ou une centaine de réfugiés à l'école de La Trinidad, que j'ai vus et avec lesquels j'ai parlé. Moi-même, comme je vous l'ai dit, j'ai parcouru la région et j'ai pu voir beaucoup de destructions.

Q. Monsieur l'abbé, à partir de ces éléments, pourriez-vous décrire à l'intention de la Cour ce que vous savez de ces méthodes de combat des *contras* ?

R. Je dirais d'abord qu'ils ne recherchent jamais l'affrontement. C'est une caractéristique. Je crois que tous ceux qui ont eu à combattre contre les *contras* disent tous qu'ils attaquent, mais toujours par surprise et en essayant de ne jamais avoir d'affrontements. Ensuite, je dirais qu'ils tâchent de brûler et de détruire et ils sont toujours en surnombre. Chaque fois que l'on parle avec quelqu'un d'une coopérative, il nous dit qu'ils sont arrivés à deux cents ou trois cents alors qu'eux n'étaient que quinze ou vingt. Je me souviens, à côté de Quilalí, dans une petite coopérative, ils m'ont dit : « nous étions neuf membres mais cinq étaient mobilisés, donc nous n'étions que quatre. Ils sont venus à deux au trois cents. Ils nous ont attaqués en pleine nuit. »

Q. Précisons une chose en ce qui concerne ces méthodes. Avez-vous constaté ou avez-vous entendu dire que les *contras* ont fait porter leurs attaques sur des populations civiles ?

R. Oui. J'aurais plusieurs exemples à raconter. A côté de Quilalí, à une trentaine de kilomètres à l'est de Quilalí, il y avait un petit village qui s'appelait El Coco. Les *contras* sont arrivés, ils ont tout ravagé, tout détruit, tout brûlé. Ils sont arrivés dans une petite maison et l'ont mitraillée sans faire attention s'il y avait des gens à l'intérieur. Deux enfants qui, par peur, s'étaient cachés sous un lit ont été atteints. Je pourrais dire la même chose d'un homme et d'une femme qui ont été atteints dans la petite coopérative de Zacarias Olivas. La même chose. Ils s'étaient mis au lit aussi par peur. A la différence de El Coco, les *contras* venaient d'attaquer, de soutenir un combat et ils étaient en fuite. Etant en fuite, ils sont entrés dans une maison et, voyant que des gens étaient là, ils ont lancé une grenade. L'homme et la femme sont morts et un des enfants a été blessé.

Tout près de là — c'était à Panali —, je me souviens encore, deux personnes différentes m'ont dit que : « Là ici dans le petit village, il y avait un invalide. En passant par là, ils l'ont tué. » Je me souviens avoir demandé, mais pourquoi? « Simplement, par plaisir. » J'ai parlé aussi avec José Francisco. C'est quelqu'un qui a été séquestré pendant six mois. Il m'a dit qu'il a vu deux femmes avoir été égorgées devant lui. Ces deux femmes avaient été violées et après, les *contras* leur ont dit : « Maintenant qu'allez-vous dire? Vous allez dire que nous sommes des méchants, vous allez nous dénoncer. Pour que vous n'ayez pas à parler, on va vous égorger. » Elles ont dit : « Non. De grâce, ne nous tuez pas! » A ce moment-là, ils leur ont mis un torchon sur la bouche, ils ont pris un grand couteau et ils les ont égorgées. Je dirais que c'est le crime systématique. Tout à l'heure, j'évoquais tous les gens qui défendent leurs coopératives, ce sont ceux-là qui sont souvent la cible des attaques. Je pense aussi à celui qui avait des fonctions d'ambulancier à Telpaneca. C'est un petit village à une trentaine de kilomètres de San Juan del Rio Coco. Là, il y avait un monsieur qui faisait fonction d'ambulancier. C'était un vendredi, le jour où arrivaient les élèves de mon école pour aider aux vaccinations. Ce jour-là, ils sont arrivés avec la nouvelle que celui qui faisait fonction d'ambulancier avait été tué dans une embuscade. Au moment de l'embuscade, tous les brigadistes ont sauté du camion et le chauffeur a dit : « Non. La voiture est à mon frère. Moi je reste dans la voiture et vais discuter avec eux. » Il n'y a pas eu moyen de discuter. Au moment où les *contras* sont arrivés, ils l'ont tué.

Q. : Monsieur l'abbé, vous avez largement anticipé sur la question suivante que je pensais vous poser. Avez-vous constaté ou avez-vous entendu dire que les *contras* pratiquent la torture ou infligent des mutilations?

R. : Je l'ai entendu dire plus que je l'ai vu. Quand les *contras* torturent, en général ils achèvent leurs victimes; mais elles se déduisent facilement quand on retrouve des cadavres. Par exemple, le cadavre de José Elias Gutierrez qui habitait Los Carbonales, tout à côté de La Trinidad. On l'a retrouvé avec sur le cou des marques de strangulation, avec la poitrine complément broyée. Il y avait certains os qui étaient également broyés. C'est assez souvent que j'ai entendu parler de gens qui avaient les yeux crevés, arrachés à la baïonnette, et je crois surtout de préférence pour tous ceux qui participent de près ou de loin au processus de la révolution. Je pense à un étudiant en médecine de León qui était dans le petit village d'El Coco, que j'ai cité tout à l'heure, et à qui on a coupé les deux bras et arraché les yeux. Je pense à Julio Tercero, c'était un employé de la radio Segovia à Ocotal. Le dimanche où ils sont entrés à Ocotal, ils ont voulu détruire la radio et, en entrant dans la pièce où se trouvait Julio Tercero, ils l'ont pris, lui ont arraché les yeux, lui ont ouvert le ventre et les intestins en sont sortis. J'ai même une photo à la disposition de la Cour où l'on voit Julio Tercero calciné mais on voit les intestins qui sont sortis. Les gens sont achevés. Camilo Garcia est un ami infirmier que je connais, il a eu de la chance parce qu'il n'est resté dans leurs mains que quelques heures. C'était le jour de l'attaque de La Trinidad et, comme les *contras* avaient attaqué par surprise, ils croyaient parler avec un membre de l'armée nicaraguayenne. Les *contras* l'ont abordé et lui croyait que c'était des soldats de l'armée nicaraguayenne. Ils lui ont dit : « Toi, tu es un petit chien. » (Au Nicaragua, il y a une expression sympathique pour désigner les militaires, pour désigner ceux qui défendent le pays. On les appelle les « petits chiens de Sandino ».) Les gens de la *contra* l'ont abordé et lui ont dit : « Mais tu n'as pas affaire à un petit chien de Sandino, tu as affaire à un petit chien de Reagan. » A ce moment-là, ils lui ont envoyé un bon coup de poing dans le ventre au point qu'il est tombé à terre. Après, ils lui ont dit : « Qu'est-ce que tu fais ? » Il a répondu qu'il était infirmier. A ce moment-là, ils ont pris les deux canons de fusil et les lui ont collés ici. Il a encore des brûlures un mois et demi après. Je suis sûr qu'à cette heure-ci il a encore tout le cou brûlé.

Q. : Bien, Monsieur l'abbé, avant de continuer cette énumération, avez-vous constaté ou avez-vous entendu dire que les *contras* enlèvent ou séquestrent des personnes dans les zones dans lesquelles ils opèrent ?

R. : Je dirais que les séquestres sont une des raisons pour lesquelles une partie des paysans sont regroupés. Si vous voulez, ici, se trouve Quilali. De Quilali à Wiwili, dans cette région-là, au nord, il ne reste pratiquement plus de paysans en âge de porter les armes parce qu'ils ont tous été séquestrés. Je me souviens aussi de Avelino Lopez, avec qui j'ai parlé il n'y a pas très longtemps, qui est resté ligoté pendant vingt-quatre heures ; de Camilo Garcia que j'ai déjà cité. Je pourrais parler aussi de voyageurs qui, le jour de l'attaque de La Trinidad, partaient en bus pour le Guatemala ou le Mexique. Ce bus a été brûlé. Les *contras* l'ont arrêté pendant l'attaque, l'ont brûlé ; les gens sont descendus et ont été emmenés, mais grâce à l'arrivée de l'aviation sandiniste, ils ont pu s'échapper. Je pense aussi à cette jeune fille qui vivait à La Vigia, une petite communauté à côté de Quilali, que j'ai rencontrée à l'occasion de mon activité professionnelle. Elle avait été enlevée pendant six mois et est revenue avec une maladie vénérienne ; elle expliquait comment elle avait servi de prostituée pendant ces six mois. Je pense aussi à José Francisco, du côté de La Venecia, pas très loin de Condega, au nord-est d'Esteli. Ce jeune garçon de dix-sept ans a été séquestré pendant également cinq ou six mois au Honduras et il me racontait qu'il est resté avec les deux mains attachées derrière le dos. Même pour faire ses besoins physiologiques, il avait les mains attachées, il n'a jamais pu prendre de bain. Il avait vu au Honduras des femmes d'un certain âge et des enfants et les *contras* disaient que ces gens-là ne servent à rien et qu'il valait mieux les envoyer dans des centres de réfugiés. Il avait vu, dans les premières heures de sa séquestration, le viol de deux jeunes filles qui ont été égorgées. Il disait aussi qu'il avait des amis au Honduras, mais on n'avait pas confiance en lui car on pensait qu'il allait s'échapper. Il y avait cinq Nord-Américains qui entraînaient les autres personnes, mais pas lui car il n'était pas de confiance. J'ai à la disposition de la Cour le récit sur cassette de ces six mois passés au Honduras. On est aussi sans nouvelles des frères Rugama de la région de Quibuto. Ils ont été séquestrés et leurs parents n'ont aucune nouvelle depuis plusieurs mois. Chaque fois que l'on va dans un de ces villages de réfugiés ou que l'on parle à des gens qui font partie de coopératives ou qui ont été attaqués, ils nous disent que chaque fois il y a des morts, des blessés et des séquestrés. C'est systématique. Je me souviens encore maintenant de Luis Siles, que j'ai rencontré à San Bartolo, et qui m'a dit qu'il a été séquestré, mais, s'étant échappé, ils ont voulu se venger : ils ont enlevé sa fille de quinze ans. A El Jobo, à côté de Quilali, il y a deux jeunes filles d'à peine quatorze ans qui ont été séquestrées il y a quelques semaines.

Q. : Monsieur l'abbé, répondant à ma question sur les méthodes de la *contra*, vous avez donné un certain nombre d'indications, avez-vous constaté ou avez-vous entendu dire que l'armée nicaraguayenne pratique les mêmes méthodes ?

R. : Non, et ce serait surprenant de la part d'un gouvernement qui, dans ses premières décisions, a supprimé la peine de mort. Je vois mal comment un gouvernement pourrait après cela ordonner à ses soldats de pratiquer les mêmes méthodes. Je crois qu'il y aurait comme une contradiction.

Q. : Vous croyez ou vous savez ?

R. : Je ne connais pas de cas de ce genre.

Q. : Merci. Vous avez évoqué tout à l'heure l'attaque de La Trinidad, est-ce que vous pourriez indiquer à la Cour dans quelles conditions s'est faite cette attaque et à quel moment ?

R. : Le 1er août 1985, il y a un mois et demi tout juste. C'était à cinq heures du matin, il faisait encore à peine jour, et les *contras* étaient déguisés en soldats de l'armée sandiniste. Il était impossible de reconnaître qui était qui. Ils ont attaqué mais d'une manière sélective. Ils ont voulu attaquer le centre de santé qu'ils ont manqué en partie, et ils ont aussi attaqué l'endroit où se trouvaient les responsables sandinistes. Plusieurs personnes à La Trinidad m'ont dit qu'ils demandaient des noms précis, par exemple le responsable du front sandiniste pour La Trinidad. Ils ont demandé le nom du responsable des présidents de quartier et ils l'ont obtenu. Il se rendait à son bureau lorsqu'il a été tué. Ils recherchaient aussi le curé de La Trinidad. Pendant ce temps, ils ont brûlé le bus d'évangélistes qui se rendaient au Guatemala comme je l'ai déjà dit et ils ont attaqué avec une roquette (j'ai une photographie que je tiens à la disposition de la Cour) un grand silo à maïs qui est maintenant éventré. Puis tout le silo a pris feu, détruisant un petit moteur de ventilation et un hangar où étaient entreposés des haricots rouges. Je ne crois pas que ce soit utile à la Cour mais, si elle le désire, j'ai des haricots rouges calcinés à sa disposition ainsi que des sacs brûlés.

Q. : Monsieur l'abbé, repartons en arrière dans les questions que je vous ai posées. Répondant à l'une de mes premières questions, vous avez indiqué que vous avez été amené à effectuer de très nombreux déplacements dans la région de La Trinidad et d'Esteli, pourriez-vous indiquer brièvement à la Cour ce que vous avez constaté à ces occasions ?

R. : J'ai constaté des spectacles qui m'ont souvent ému. Je commence par celui qui m'a peut-être le plus ému parce que j'y avais vécu une des plus belles expériences de ma vie au Nicaragua, c'était lorsque j'avais fait la cueillette du café. Je suis retourné à La Ilusion, c'est à côté de San Juan del Rio Coco, et j'ai vu que toute l'exploitation de café avait été détruite. Cela m'a fait mal au cœur. Mal au cœur aussi d'apprendre que, le jour du 1er janvier, nous avions fait une petite célébration liturgique dans la maison d'un paysan qui avait joué de la guitare au cours de cet office. J'ai appris qu'il avait été tué. Il faudrait parler également du spectacle hallucinant d'El Coco que j'ai évoqué tout à l'heure quand je suis arrivé sur cette plaine. Il restait quelques maisons sur le côté. Au milieu c'était une plaine où il ne restait simplement debout que les latrines et puis deux tracteurs complètement calcinés. Je crois que c'est un souvenir qui est ineffaçable. Puis il y a quelque temps aussi à Llano Largo, je crois que c'est trois ou quatre jours avant l'attaque de La Trinidad. Ils ont attaqué Llano Largo (c'est une petite communauté) et là, ils ont brûlé l'école, ils ont brûlé l'épicerie où il y avait les grains, le ravitaillement pour la commune. Je me souviens des gens qui m'accompagnaient pendant que je regardais le désastre, ils me disaient : « Regardez-ça : c'est la maison de Téodoro, c'est un pauvre vieux, on se demande vraiment pourquoi ils lui ont brûlé sa maison ! » Il faudrait parler de toutes les coopératives, la coopérative d'El Coco j'en ai parlé mais la coopérative Los Carbonales, celle de Caulatú, les exploitations de café d'Ocotal, d'Oroverde, de San José, de San Lucas, de San Jerónimo et puis les réserves de grain. Je crois que partout, chaque fois qu'ils attaquent une coopérative, ils vont directement aux réserves de grain, aussi bien à Caulatú, à La Palmera, à Quibuto et puis les réserves de grain pour la ville, je l'ai dit tout à l'heure pour La Trinidad, mais ils ont fait la même chose à San Juan del Rio Coco, ils ont fait la même chose aussi à Ocotal. J'ai aussi les photos à la disposition de la Cour au cas où elle le désirerait. Puis à Puertas Azules, à côté d'Esteli, ce n'est pas du maïs mais des pommes de terre qu'ils ont détruites. Ils ont également détruit l'école et le centre de santé. Enfin pour être bien sûr que tout soit détruit, avant de détruire le centre de santé, ils avaient sorti tous les médicaments dehors et puis ils les ont brûlés. Alors vous me demandez ça, mais pour moi, j'ai le souvenir d'un nombre considérable de tôles tordues, de poutres calcinées, si vous voulez, sans compter les camions ou les tracteurs qui ont été victimes d'embuscades et qui ont été brûlés.

Q. Vous avez décrit des faits, Monsieur l'abbé, jusqu'à présent. Est-ce que pour terminer vous pourriez indiquer quels sont, d'après vous, les effets et les objectifs de cet ensemble de pratiques?

R. On voit tout de suite les effets quand on voit qu'il y a eu des écoles ou des centres de formation pour adultes où des maîtres d'école ont été séquestrés par exemple, quand il y a des centres de santé, quand ce sont les outils de travail comme des tracteurs, des camions, tout cela montre déjà des effets mais je dirais aussi toute une paralysie des activités. Ainsi, il y a dix jours, quand j'ai pris l'avion pour venir ici en Europe, j'ai mis une heure et demie de plus parce que le pont qui se trouve à côté de La Trinidad avait été détruit un mois et demi auparavant, il est reconstruit mais il n'est pas encore assez sec pour que les véhicules puissent y passer, alors il y a un misérable petit chemin de déviation et il y a des embouteillages, il est donc impossible de passer par là. Et puis dans la région de San Juan de Quilalí, là aussi, ce n'est pas rentable de passer sur ces chemins parce qu'on n'a pas le droit de s'y aventurer avant 9 heures du matin, ni après 3 heures de l'après-midi. Vous rendez-vous compte qu'entre 9 heures du matin et 2 ou 3 heures de l'après-midi il n'y a que quelques heures. Dans cette même zone de Quilalí, de San Bartolo où y a des villages où les enfants, les paysans sont dispersés dans cette région, il y a des zones où les enfants ne vont plus à l'école, les gens ne vont plus au centre de santé. Alors tout cela est une paralysie des activités. Il faudrait aussi parler du nombre de gens qui sont amputés, ou qui sont invalides pour la vie. Et puis moi, comme professeur aussi, je voudrais souligner le nombre d'élèves qui sont marqués psychologiquement. Je me souviens, un lundi matin, je faisais des reproches à des élèves parce qu'elles n'avaient pas très bien réussi leur examen, mais elles m'ont dit: «Nous, nous étions à Ocotal et nous avons été attaquées; comment vouliez-vous que nous passions toute notre journée de dimanche à réviser notre examen? C'était impossible, nous avions peur que les *contras* reviennent d'un moment à l'autre.» Puis, je pense aussi, aux conséquences et aux effets psychologiques. Je me souviens d'une dame à Quibuto qui me disait: «J'ai les nerfs malades, moi, maintenant n'importe quel bruit me fait peur, m'agace, ainsi que ma famille et mes voisins.» Alors le nombre de gens marqués par cette guerre est très grand. Je voudrais signaler aussi le nombre de gens que l'on empêche d'agir, je veux dire que la dissuasion marche bien, dans ce sens, que c'est certainement une méthode des *contras* que d'employer la dissuasion pour que petit à petit les gens ne prennent plus autant de responsabilités. Je crois que c'est quelque chose qui est payant dans le sens négatif si vous voulez, quand ils tuent, par exemple, les responsables d'une municipalité. Il y a également un monsieur qui me disait dans la région de Panalí: «Moi, ils m'en voulaient parce que je faisais partie d'organisations et je me suis présenté aux élections», alors je crois qu'il y a dissuasion aussi. «Ils ont détruit ma maison parce que j'étais responsable d'un comité de quartier», par exemple, un autre me disait cela. Ou, à Puertas Azules on brûle plus de dix maisons, ensuite les gens dans le secteur n'ont plus envie de faire partie d'une coopérative. Justement des gens qui étaient à Puertas Azules il y en avait un qui me disait, un qui était séquestré d'ailleurs: «Nous étions dix-sept membres dans cette coopérative et puis maintenant nous ne sommes plus que trois, nous avons atterri dans une coopérative voisine et au lieu de dix-sept nous ne sommes plus que trois, vous voyez, les quatorze autres ont peur et ils sont dissuadés de participer d'une manière nouvelle. » Puis, j'évoquerai le climat de terreur, c'est un climat de terreur qui est très grand et puis qui est communicatif. Comment voulez-vous? Pourquoi à El Coco par exemple, après avoir tué et même violé une jeune fille, Maria Santos, qui avait seize ans je crois, pourquoi après avoir fait cela, ils l'ont coupée en plusieurs morceaux et ont répandu ceux-ci? Puis un des cas qui m'a fait le plus horreur, j'en suis encore ému. C'était au moment de la cueillette du café, l'année dernière au mois de décembre, il y avait tout un camion de postiers qui s'en allait à San Juan del Rio Coco pour aller faire la cueillette du café et, je me souviens, à l'intérieur, il y avait plusieurs postiers que je connaissais, un monsieur qui s'appelait Briones, et une dame qui était la postière de mon quartier, Carmela Davila, et qui m'avait donné plusieurs fois le téléphone pour mes communications téléphoniques. On a su, et tout le monde a été horrifié dans la région, que ce petit camion avait été victime d'une embuscade ; il y avait eu un tir de mortier et le camion n'a pas pu suivre ; il y avait des blessés et peut-être même des morts à l'intérieur de la camionnette. Les *contras* sont montés dans la camionnette, ont arraché certains vêtements, les papiers d'identité et l'argent, et ils ont arrosé les gens d'essence et ceux-ci ont pris feu. Je parcourais encore, il n'y a pas très longtemps, le chemin où l'on voit ce qui reste du camion calciné de ces postiers qui ont été brûlés vifs.

Q. Je vous remercie, Monsieur l'abbé. Monsieur le Président, je n'ai pas d'autres questions à poser au témoin et je remercie très vivement la Cour de son attention.

QUESTIONS PUT TO FATHER LOISON BY JUDGE SCHWEBEL

Judge SCHWEBEL : Father, did I understand you to say that the death penalty had been abolished in Nicaragua ?

Père LOISON : Que la peine de mort était abolie au Nicaragua ? Oui. Je crois que c'est une des premières décisions en 1979, mais je ne peux pas vous donner la date exacte.

Q. Father, in your view does it follow that if the Government proclaims the abolition of the death penalty it necessarily abstains from killing its opponents outside of combat ? Do you think a proclamation of law equates with practice ?

R. De tuer ses ennemis au moment d'une guerre, je pense que c'est normal de se défendre. Je crois que le Gouvernement nicaraguayen a l'intention de se défendre. Je pense que ça va dans le même sens qu'abolir la peine de mort. Ils tuent mais ce n'est pas pour le plaisir de tuer ; je n'ai jamais constaté la volonté de tuer de la part du Gouvernement nicaraguayen. Ce que je sais, c'est qu'ils ont le seul désir de se défendre des attaques de la contre-révolution.

Q. Father, I was not referring to defence in the course of combat but killing outside of combat. Have you heard of the killings of former members of the National Guard who were held in jail after the revolution — have you heard of that ?

R. Oui, j'ai entendu dire qu'il y avait d'anciens membres de la garde nationale qui ont été détenus. Je crois qu'il y a des prisonniers dans certaines prisons nicaraguayennes. Il y en a une, que je n'ai pas visitée, à l'entrée d'Esteli, et je crois qu'il y a des contre-révolutionnaires qui y sont prisonniers.

Q. Father, I was not referring to whether National Guard members were simply held in prison, but whether they had been killed while having been held in prison. Such charges were made to the Nicaraguan Permanent Commission on Human Rights.

R. A ma connaissance, non. Je n'en ai pas entendu parler. Ça m'étonnerait beaucoup mais je n'ai pas d'éléments pour répondre.

Q. Yes. Permit me to read out to you, Father, the following passages from a book by Miss Shirley Christian, entitled *Nicaragua : Revolution in the Family*. This book was written by a reporter who spent extended periods of time in Nicaragua and widely interviewed Nicaraguans of various persuasions.

> "The FSLN repeatedly said that it did not plan to take reprisals against former National Guardsmen and others identified with the old order but the headquarters of the Permanent Commission for Human Rights was soon jammed with people concerned about jailed or missing relatives. They, that is the Government, did not deny all abuses and generally get high marks in sympathy internationally for good intentions on human rights. However, a subsequent report by the Permanent Commission for Human Rights said executions and disappearances of people had occurred in significant numbers from the victory through October 1979. It said at least 43 people were killed by military or security forces in those early months and that people had come to the Commission offices to inform them of the disappearance of

> more than 600 people during the first year — mostly peasants and labourers from outside the capital."

Some allegations of this kind are elaborated in the following pages — I have read from page 132 and page 133. I might also point out, Father, that the Director of the Permanent Commission on Human Rights

> "met with Pope John Paul II and told him that Nicaragua had 8,000 political prisoners, mostly former National Guardsmen, and that about 800 people had disappeared or been killed for political reasons since the Sandinistas came to power, most in the first few months of the regime" (*ibid.*, p. 281).

Do you have any comment on those allegations?

R. Monsieur le juge, ce que j'ai à dire c'est que je n'ai pas connaissance de cas de ce genre mais, même sans avoir connaissance, je pense que ce sont tout d'abord des chiffres qui me paraissent énormes et en tout cas je suis absolument sûr que le gouvernement lui-même n'a jamais donné d'ordre dans ce sens-là. Et que si, par hasard, il y a eu des erreurs, je crois qu'elles doivent venir de gens subalternes, mais je suis sûr qu'il n'y a eu aucun ordre dans ce sens-là. C'est ce que je crois.

Q. Father, have you heard of Jorge Salazar? Do you know who he was?

R. Non, je ne connais pas, excusez-moi.

Judge SCHWEBEL: That concludes my questions, Mr. President.

The Court rose at 11.10 a.m.

TWENTY-FIRST PUBLIC SITTING (17 IX 85, 3.15 p.m.)

Present: [See sitting of 12 IX 85.]

EVIDENCE OF MR. HUPER

WITNESS CALLED BY THE GOVERNMENT OF NICARAGUA

Mr. ARGÜELLO GOMEZ: I would like the Court to call our next witness, Mr. William Huper. I shall conduct the examination myself.

The PRESIDENT: I summon Mr. William Huper, the Minister of Finance of Nicaragua.

Mr. ARGÜELLO GOMEZ: Mr. President, I would like to start by requesting Mr. Huper to read the declaration before him.

Mr. HUPER: I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth.

Q. Mr. Huper, will you please state your full name?

A. My name is William Huper.

Q. When and where were you born?

A. I was born in Managua, Nicaragua, on 12 October 1949.

Q. Will you please tell the Court where you received your education?

A. I have a Bachelor's degree in Social Science, with a major in History from the National University of Nicaragua, and later I went to Graduate School of Political Economics in Mexico, during which time I was also a teacher in Economics, at the National University.

Q. You are presently the Minister of Finance of the Republic of Nicaragua?

A. Yes.

Q. When did you take up this appointment?

A. In January 1985.

Q. Would you tell the Court what positions you held previously?

A. I have served continuously since the beginning of the revolution as Vice-Minister of Finance.

Q. It is understood that this is up to the time when you were appointed Minister?

A. Yes, until last January.

Q. Would you describe the precise scope of your responsibilities both as Minister of Finance and, earlier on, as Vice-Minister?

A. In doing my duties, I am responsible for the planning of fiscal policies in Nicaragua and I am also a full member of different Commissions at Cabinet level in Nicaragua, which are in charge of defining different economic policies and also are responsible for the making of the annual programme. I have also served as a representative of my country in the World Bank and the International Monetary Fund meetings and also in different meetings at the regional level in Central America.

Q. Is it correct that your experience and expertise include the problems of development economics?

A. Nicaragua is an under-developed country, or as it is commonly called a developing country. This means that Nicaragua is a country with a very fragile infrastructure and a high dependence on the international economic trends. One of our main goals in our political economic strategy has been to improve the standard of living of our population through, for example, the construction of schools, medical posts and another has been to strengthen our economy through new investments. These are problems directly related to the carrying out of development economics which in the case of Nicaragua, has been done in a very difficult context due to the aggression.

Q. Could you please outline the nature of the economic damage which has been caused by the military and paramilitary operations against Nicaragua?

A. Military and paramilitary operations in and against Nicaragua have affected everything, from human life to schools, from material damages due to sabotage to the coffee production. The war has affected all our economic and social order in Nicaragua.

Q. Could you please explain when this economic damage first manifested itself?

A. There were some hostile activities against Nicaragua in the last months of 1981, that affected the fishery industry due to the hijacking of boats.

Q. In what period or periods has the incidence of damage been particularly severe?

A. There have been different times and also different types of damage. The most severe damage occurred during 1984. During 1984, we estimate that the overall impact of the war on our economy rose to an estimated 178 per cent of the total export earnings. During 1984 production losses due to the war have been estimated at about 40 per cent of total export income. I think it is important to indicate that besides this type of economic damage there is another which is accumulative. It means that there is a bigger impact as time goes on. There is for example economic damage due to the financing of different activities in Nicaragua: production losses also have an accumulative impact on the economy as also do project delays. All of which reduces the standard of living of our population.

Q. Going from the general economic damage to more particular type of damage, could I ask you to describe the loss of production caused by the hostile activities?

A. In order to describe the losses of production, I have here with me a report made by the Economic Commission for Latin America. This is a report which analyses the performance of the Nicaraguan economy in 1984. In its estimation, the overall impact between 1981 and 1984 due to production losses, is a little higher than US$300 million. This sum is 75 per cent of our total export earnings from 1984. For production losses in this report the concept includes losses due to the inability to collect crops; the inability to process production and also losses due to the inability to develop production projects, or because of delays in production-related projects.

Q. To put things in perspective, could you please give the Court some estimate or figures as to particular losses in production in coffee production or in any other type of activity?

A. For example, during the harvests of 1983-1984 and 1984-1985, coffee production suffered losses totalling US$70 million. This is about 12 per cent of our total earnings coming from exports during those years. It is also about 33 per cent of our total export earnings from coffee production, during that period.

Q. You have been referring to a report by the Economic Commission for Latin America, would you please explain to the Court the status of that report?

A. This is a report prepared by a specialized agency of the United Nations that is the Economic Commission for Latin America. This Commission provides assistance to all Latin American countries and they annually make a report on each of the Latin American countries. In the case of this note to which I have referred, it describes the trends in our economy during the past seven years. They also evaluated the performance of our economy during 1984 and finally reached some conclusions and made a prognosis for the Nicaraguan economy. In this document there is a chapter in which the Commission analysed the impact of the aggression in certain fields of economic activity in Nicaragua.

Q. Is it the case that the economic loss caused includes the cost of rehabilitating damaged production units and capital goods generally?

A. I assume that this refers to damage to capital goods such as trucks, vessels, bridges, schools, medical posts, production machinery and, let us say for example, the maintenance of roads, and that also includes material damages, for example, damages to spare parts and to raw materials that are indispensable for the processing of production.

Q. Would you please indicate these costs, at least approximately, if possible?

A. In this report we have an estimated figure of about US$100 million due to damages to capital goods and material damages. Perhaps I can give an example of the impact that this has on our economy. During the four-year period of which I am talking, about 26 boats from our fishing industry have been damaged. Half of them were sunk by mines and the other half were hijacked or destroyed by fire. It might be important to note that at the present moment our total fleet comprises about 50 boats dedicated to fishing activities.

Q. Is it the case that the economic loss caused includes the loss of development capital?

A. Production losses, especially those in areas directed towards export, have a negative impact on our capacity to import, which is also more constrained due to the fact that indispensable means of production have been destroyed, so we have to import them. The net result is that we have a lower cash flow in our balance of payments, which also has an impact on our possibilities of servicing our foreign debt.

Q. Is it true that the economic loss caused includes the loss of foreign trade and adverse effects on the balance of payments?

A. Yes, the figures estimate the impact on foreign trade and on the balance of payments. For example, damages to production marked for export totalled about US$280 million during this period, which means about 70 per cent of our total earnings from exports during 1984. The war has also affected other types of production for export. Nicaragua has a very fragile economic structure, as I explained before, and we rely on five or six different commodities to obtain our earnings from exports. These commodities are coffee, cotton, meat, sugar, fish and mining products, and since the war has had a great impact on fisheries, mining, coffee production and cattle raising activities, our foreign trade has been affected very seriously. We have estimated that in the absence of war during 1984, our balance of trade would have been improved by at least US$200 million. All these activities have a direct impact on the balance of payments.

Q. Am I correct in assuming that a significant aspect of the economic damage has consisted of defence costs?

A. Yes, that is correct.

Q. Would you please give an indication of those costs?

A. Our defence budget as part of our total budget was about 12 per cent by 1980, and now during this present year we estimate that the defence budget is going to be between 38 and 40 per cent of our total budget. This means that while the defence budget increases it affects other activities that are also financed through the budget. For example, it affects social programmes, development projects and also the level of consumption of the population, because it has the impact of a big competition in the allocation of resources. Many industrial commodities have to be reallocated from popular consumption to activities directly related to defence.

For example, I remember that during 1983 about 60 per cent of the total production of dry milk was distributed in the Pacific regions of Nicaragua, in which two-thirds of the population live. But, due to the increase in aggression that has had an impact on the production of fresh milk in the war areas, we have had to reduce the quota for the Pacific zones of the country to only 40 per cent. This has had an impact on the consumption level of the population.

Q. In speaking of defence costs, did your figures include the costs of dealing with the consequences of the hostile activities for the civilian population?

A. In some of them, yes, but in most of them, no, because it is difficult for us to quantify certain effects of the war on the civilian population. It is difficult for us to quantify, for example, the impact of several thousand people who have been killed, or wounded, and the impact this is going to have on our country, because many of these people were qualified to do civilian jobs. It is also difficult to quantify such things as, for example, that in the regions 1 and 6 — which are located in the northern part of Nicaragua near the border with Honduras — there live about eight hundred thousand persons, of whom about two hundred thousand have been affected in one way or another by the aggression. Many people have been displaced, and due to the difficulties in these areas the control of some epidemic diseases — which had been highly improved in recent years — cannot go on. There are also several thousand students who cannot go to school because of the same reasons. Thus, these are the type of costs that affect the civilian population — such as, for example, the climate of terror that exists in Nicaragua, which keeps the population under stress all the time — this is also very difficult to quantify. I might add to this the necessity of mobilizing several thousand young people who should be — at this moment — at university.

Q. You have been giving various figures in response to this series of questions. Would you please explain the methodology upon which those figures have been based?

A. Yes; to establish the economic cost of the aggression, a central register has been established in the presidency. This central register collects the information and provides monthly reports about the impact of the aggression, which also include killings, woundings and kidnappings. The sectoral ministries — especially those that are in charge of overseeing production activities — through their regional delegates estimate the impact on co-operatives, farms and, let us say, in production damage. This provides us with a monthly report in which there is also an effort to estimate the impact that the cumulative cost — to the end of one month, two months, etc. — is going to have during that year. This system, this methodology, has been checked and improved by experts from the Economic Commission for Latin America. The method of doing this is very similar to the one that is used to estimate the impact of natural phenomena such as floods or earthquakes.

Q. In your opinion, apart from the economic damage to which you have referred, has the United States caused other types of economic loss to the Republic of Nicaragua?

A. Yes.

Q. Can you describe the consequences of the economic pressure applied by the United States that has caused these losses?

A. I might try to give a perspective of this other type of economic damage. For example, in March 1981 the United States Government decided to suspend the bilateral aid to Nicaragua; even if this was for loans previously contracted. This has had an impact of more than US$36 million. By May 1983 the United States decided to lower our sugar quota by 90 per cent. Since then the annual economic impact has been between 15 and 18 million US dollars due to the preferential system of prices that sugar has in the market of the United States. During that time, also, the United States Government continued to exert pressure on multilateral institutions to impede our access to loans. We have estimated that in the absence of this pressure we might have been able to contract more than 400 million US dollars during these years, of which we estimate that up to now half of it might have been expended.

There is also an economic impact due to the sabotage against our fuel storage tanks in Corinto. The economic impact of destroying twice the oil pipeline — the only oil pipeline that we have in Nicaragua — and of course there is the economic damage due to the mining of our ports, which has had the effect of increasing the freight and the insurance costs. More recently we have to add to this the commercial embargo that was declared against Nicaragua last May.

Q. To sum up, would you give the Court an estimate of the overall impact on the economic development of Nicaragua of the hostile activities of the United States?

A. As I previously mentioned, Nicaragua is a developing country with a very fragile infrastructure, and since the aggression has affected everything, the overall impact on the development of my country is really tremendous. There have been examples of the impact on development, for example the one I mentioned earlier, on half of the fleet of vessels dedicated to fishery activities being damaged by the war; in countries like ours, the impact that the blowing up of one bridge has on the economy is big because it means that there is no possibility of going through that road, which is the way of transporting people and commodities. We do not have different systems or alternative systems of roads for reaching different points in Nicaragua. Also the impact on Nicaragua's development has to be seen from the human side; since the beginning of our revolution we have stated as one of our main economic goals to increase the standard of living of our population and another one was to strengthen the economy through investment in the agricultural sector which is the pivotal sector for accumulation in Nicaragua, and since there have been many delays in projects there has been a lot of damage to human life, in medical posts, in schools, etc., and this is going to have a tremendous impact in our country that is going to last several long years after we achieve a solution for the aggression. It is quite difficult to put this into figures because it would require a projection of what would have been without the war; however, I would like to mention that there is a report on Nicaragua made during the year of 1980 and made public during the first quarter of 1981, that is called the *Challenge of Reconstruction*. This is a report made by the International Bank for Reconstruction and Development (The World Bank) and I would like to mention it because I think the World Bank is a prestigious economic institution which has the ability of making prognoses and it specializes in matters relating to development. In their projections, the World Bank estimates that between 1980 and 1985 the increase in production in Nicaragua would have been 39 per cent instead of the 9 per cent that is the actual authorized figure. They also said in this report that in the year 1984 our exports would have been US$1.1 billion instead of US$428 million — that is the figure presently authorized. Also, the World Bank estimates in its projections that between 1981 and 1985 our country was supposed to receive a net flow of more than US$400 million coming from multilateral institutions; in reality, the net flow during this period has only been US$100 million. At the end of this document, the final conclusion is that the Nicaraguan economy during this period should have risen at a rate of 6 per cent annually instead of the 1.5 per cent that is the real annual growth of our economy.

Q.: One final question, in its Memorial submitted to the Court, Nicaragua has claimed the sum of a little more than US$370 million, in respect of certain categories of direct damages; in your opinion what proportion does this figure bear to the total economic loss suffered by Nicaragua as a result of the hostile activities of the United States?

A.: I think that that figure of US$370 million is rather a small figure for the overall economic damage to Nicaragua. Several months ago we established an inter-ministerial working group to obtain some preliminary figures about the overall impact on the economy of the aggression, and our preliminary figures are about US$1.3 billion. There is also a recently made document about this same problem by an independent source who specialized in analysing the economic and social situation in countries of Central America and the Caribbean region, which concludes that the total losses due to war are a figure of about three billion dollars.

Mr. ARGUELLO GOMEZ: Mr. President, I have finished the questions addressed to Mr. Huper and he remains at the disposal of the Court.

QUESTIONS PUT TO MR. HUPER BY JUDGE SCHWEBEL

Judge SCHWEBEL: Mr. Minister, am I correct in my impression that in the summer of 1979 when the revolutionary government took power, the Nicaraguan economy was in very bad shape, suffering still from an earthquake and, much more than that, suffering from very severe fighting that had taken place in the course of the overthrow of the Somozas?

A. Quite right, that is correct.

Q. It is also the fact that immediately on taking power the Sandinista Government began a very large-scale military build-up? I am speaking now of the period of the last half of 1979 and the year 1980, is that the fact or is it not the fact?

A. Since the Somozas National Guard was properly dismantled and their members had fled to Honduras there was the necessity of building up a new army. So this took place immediately after the beginning of the revolution.

Q. My understanding is that by the end of 1980, some six months after the assumption of power by the revolutionary government, Nicaragua's armed forces were twice as large as the Somoza National Guard at its height when it was in full bloom and that the Sandinistas Peoples Army doubled in size again by the end of 1982. According to the International Institute of Strategic Studies, Nicaragua's regular armed forces in 1977 under Somoza numbered 7,100 men and 4,000 paramilitary forces. By 1982 the Sandinista armed forces numbered 21,500 and its paramilitary forces 50,000. This is quite a significant build up — would you not agree — to deal with the remnants of the Somoza National Guard?

A. I think it is a matter related to a different type of activity than the one I am in charge of, and I prefer not to speculate about military facts or this sort of thing.

Q. I understand that, but I understood you to have cited as an element of the economic trauma or damage which your country had suffered as a result of *contra* action and United States support of *contra* action, the large defence forces that Nicaragua consequently has found itself required to maintain and I am inquiring of you how you can make that statement when the record demonstrates that very large forces were built up before *contra* activity was undertaken and certainly before the United States did anything substantial in respect of the *contras*, because while you were not in the room, I can inform you that your colleague, Commander Carrión, testified that it was only at the end of 1981 that the *contras* showed any signs of an infusion of United States assistance. Have you any comments?

A. Yes, I assume that all countries need, for national defence purposes, to have their own army and so as I mentioned before soon after the beginning of the revolution there was the necessity of building a new army in Nicaragua. I think I mentioned previously the fact that in 1980 the proportion of the defence budget was a total of about 12 per cent of the total Nicaraguan budget and that due to the aggression there was an increase in defence activities which led us to a situation where the defence budget had to be increased. It is important to mention that as far as I know, included in this figure are costs of organizing the population, that is, for defence purposes, for the protection of their own families.

Q.: I have no doubt that Nicaragua's defence forces have been built up very quickly in recent years, since the end of 1981. I was simply pointing out that, by the terms of Nicaragua's own analysis and testimony submitted in this case, the *contra* action began with United States assistance at the end of 1981 and a very large-scale military build up took place before that time, so presumably it could not have been in response to "aggression" which had not occurred. Indeed, we heard a previous witness testify this morning or yesterday that plans were being discussed for such action in the Fall of 1981, but not that they had been executed before the winter.

Now, let us pass to another item of economic damages that you have mentioned, Mr. Minister. If I understood you correctly, you indicated that you are of the view that an element of damage — I am not sure if this is an element of claims which Nicaragua makes against the United States, you did not make that clear — but at any rate an element of damage sustained, is that the United States cut off aid. That is to say, it had given Nicaragua under the revolutionary government some $118 million in aid. It had repeatedly submitted to the Government of Nicaragua that if it persisted in arming insurgency in El Salvador that aid would stop. In the view of the United States, aid to the insurgency did not stop and the aid was cut off with a certain amount of projected aid not dispersed. Do you maintain that Nicaragua has a claim against the United States for that undelivered aid, that it has some kind of right to that fund?

A.: I think when I mentioned the suspension of bilateral aid from the United States Government it was in the context of some other types of economic aggression costs to Nicaragua.

Secondly, I presume that the decision for the suspension, and the provisional measures that were taken before, are more related to the last month of the electoral campaign in the United States than to the fact of this supposed arms smuggling to El Salvador.

Q.: In that regard I would recall to you that the representations of the United States Government about the shipment of arms to the insurgents began under the Carter Administration, not under the current Administration of the United States. A second item of damage suffered, if I understood you correctly, that you listed, was the lowering of the sugar quota accorded to import of Nicaraguan-produced sugar into the United States — I believe you said by 90 per cent. What is the sugar quota? Can you describe to the Court what this is? It may be that all of us are not familiar with it, as those that live in the western hemisphere may be.

A.: Our sugar quota to the United States used to be about 58,000 short tons and it was lowered to 6,000 short tons. Comparing international prices during 1983 and 1984 and the difference of opportunities between selling sugar in the international market and the preferential prices that are offered in the United States market gives an estimated loss of between US$15 and US$18 million annually.

Q.: And is that an element of the claims of Nicaragua against the United States, that loss as you described it?

A.: I also mention this loss in the context of another type of economic impact due to the aggression against Nicaragua.

Q.: Was there any treaty right of Nicaragua to enjoy a sugar quota, or any other claim as a matter of law to the sugar quota, to your knowledge?

A. No, I do not know of any.

Q. Your initial answer is correct. A sugar quota is simply a bonus paid by the United States tax-payer to protect American producers of sugar, but it is not a bonus to which any foreign State is entitled as of right.

Let us now turn to a third item of economic loss, that of loans which Nicaragua anticipated receiving from international institutions but maintains it has not received because of United States opposition to such loans. Viewing this for a moment now, as I will ask you to do, from the perspective of a United States director sitting in an international bank, trying to adjudge whether Nicaragua seemed a good bet for international loans, would you say he might have reason to vote against such loans on the ground that Nicaragua was devoting an enormous proportion of its relatively scarce resources to an unprecedented military build up and was engaged in a course of foreign policy and action which led to the most difficult relations with its immediate neighbours?

A. More that two years ago officials of the United States Treasury Department made public that the United States was going to oppose any loan that might go to Nicaragua. There is a recent case of a loan requested from the Inter-American Development Bank, which was approved by the technical staff of the Bank before the loan was submitted to the Board of Directors. The Secretary of the Department of State of the United States, Mr. Shultz, sent a letter to Dr. Antonio Ortiz Mena, who is the President of the Inter-American Development Bank, in which he said that the loan should not be given to Nicaragua because, amongst other reasons, this was going to put us in a better economic situation.

Q. And what were those other reasons that were cited? You said among other reasons, Mr. Minister. Can you recall them?

A. Yes, I think he mentioned that our internal economic policies were not good, which is something to be said by the technical staff of the Bank, which stated that the loan was technically approved.

Q. You were not present during the examination of other witnesses. Let me summarize for you some facts that will be pertinent to a question I am about to ask you, which I think can be fairly deduced from the testimony introduced so far.

(*a*) The Nicaraguan Government has been a source of arms for the insurgency in El Salvador, particularly — possibly exclusively, but certainly particularly — for the big offensive in 1981 of the El Salvadoran insurgents.

(*b*) The leadership of the El Salvadoran insurgents freely operates out of Managua and elsewhere in Nicaragua.

(*c*) A radio station of the El Salvadoran insurgents has broadcast from Nicaraguan territory.

(*d*) The training of El Salvadoran insurgents may well take place in Nicaragua as well as Cuba.

Now, in any event, whatever may finally be established on the extent of the support and the nature of the support by the Government of Nicaragua for insurgency in El Salvador, let us assume for the purposes of this question that the Nicaraguan Government is or has been significantly involved in support of the insurgency in El Salvador since the Sandinistas came to power. Now you, Sir, have testified that Nicaragua has suffered some US$370 million in, I believe, direct damages from the degradations of the *contras* and related actions and you have spoken of other economic damage suffered. If I understand the purport of your testimony and your Government's Memorial correctly, your Government means to claim reparation from the United States for at least the former category of damages, should it be established by the Court that the United States is responsible under international law. Now, permit me to note that the Government of El Salvador filed a Declaration of Intervention in this case in which it claims to have suffered about \$1 billion in damages — \$800 million as at the end of 1983 — from the activities of the insurgents, which El Salvador claims are critically and vitally supported by the Government of Nicaragua. Permit me to read a few sentences from its Declaration (**I**, p. 455):

> "The damage caused to the economy, to our infrastructure and to the people of our country is immense and very difficult to calculate. The cost in human lives is alarming. As a result of the insurgency, supported by the Sandinistas, we have approximately half a million persons internally displaced in our country and over 30,000 persons have been killed in the conflict since it was unleashed in 1979. The subversives, aided and abetted by their allies in Nicaragua, have destroyed farms, businesses, bridges, roads, dams, power sources, trains and buses. They have mined our roads in an attempt to disrupt our economy and with the purpose of preventing our citizens from participating effectively in the national elections. The total of damages produced by this subversion to the Salvadoran economy since 1979 to the end of 1983 has been conservatively estimated to amount to approximately \$800 million."

I apologize for that long introduction, Mr. Minister, but my questions are these: does it follow from the principles of State responsibility and imputability that if the United States is financially liable to Nicaragua for the damage inflicted by the *contras*, Nicaragua is financially liable to El Salvador for the damage inflicted by the Salvadoran insurgents? That is to say, I am now asking you, Sir, whether the very theory of damages advanced by your Government does not equally apply against your Government and in behalf of El Salvador?

A.: We have always stated that the Nicaraguan Government has never been engaged in arms smuggling in Central America and secondly, I think that it is commonly known that the United States Government not only finances but also directs and controls the *contras*' activities in Nicaragua, thus the United States Government is responsible for the economic damage that has been caused during these activities.

Q.: I might point out that the record as it has been put before the Court the last few days does not seem to fully sustain the denial you have just made of the involvement of your Government in support of the insurgents in El Salvador by the shipment of arms. But, quite apart from that, I would be interested in knowing whether it is your impression as a senior official of the Government of Nicaragua resident in Managua whether leadership of the El Salvador insurgents is or is not frequently present and operating on Nicaraguan soil. Do you have any impression as to that?

A.: As far as it is related to myself, I have never had a meeting with them and I have never seen one of them in Nicaragua.

Judge **SCHWEBEL**: I have no further questions.

The meeting rose at 4.40 p.m.

TWENTY-SECOND PUBLIC SITTING (18 IX 85, 10 a.m.)

Present: [See sitting of 12 IX 85.]

STATEMENT BY MR. ARGÜELLO GÓMEZ

AGENT FOR THE GOVERNMENT OF NICARAGUA

Mr. ARGUELLO GÓMEZ: Mr. President, Members of the Court, at this point I will limit myself to indicating the way in which the pleadings will proceed. We have divided our pleadings into the following general categories. First, the issues of fact which will be examined today by Professor Chayes and Mr. Reichler. The point and the nature of the evidence will be examined tomorrow by Professor Brownlie and, in the following session, the breaches of relevant multilateral treaties will be examined by Professor Chayes. The bilateral Treaty of Friendship, Commerce and Navigation will be examined by Professor Pellet, and a further point, which is the role of customary law, will be examined by Professor Brownlie. I will, at the end, as Agent address certain relevant questions that have arisen in the course of these hearings.

Now, Mr. President, if it pleases the Court, I would ask you give the podium to Professor Chayes to start the pleadings.

ARGUMENT OF PROFESSOR CHAYES

COUNSEL FOR THE GOVERNMENT OF NICARAGUA

Professor CHAYES: Mr. President, Members of the Court, May it please the Court.

Nicaragua has now completed the presentation of its proof in this case. The material in evidence is lengthy and complex. It consists of almost 400 affidavits, official statements and other documents in the Annexes to the written pleadings in the Merits phase alone, and more than 12 hours of testimony by the witnesses you have heard in the last few days.

As is quite obvious in this courtroom, the Respondent in this case, the United States of America has declined to participate in this phase of the proceedings. In such circumstances, under Article 53 of the Statute, the Court must satisfy itself not only that it has jurisdiction of the case, but "that the claim is well founded in fact and law". The Court has already decided, on the basis of written and oral pleadings in which the United States participated fully, that it has jurisdiction and that the case is admissible. Nicaragua believes that the evidence presented proves beyond any shadow of doubt that Nicaragua's claims are well founded in fact, and that the United States is in violation of its most fundamental international obligations under the Charter of the United Nations and the Organization of American States, under the Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States, and under general international law.

The Court itself has recognized that in cases of this sort, and in the absence of the Respondent, the evidence will necessarily come from a variety of sources — some of them less formal than is usual in international adjudication (*Corfu Channel, I.C.J. Reports 1949*, p. 4, at 248; *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3, at 9-10). In this case, the documentary evidence before you consists in large part of statements of the President of the United States, high officials of his Administration, and members of Congress.

For almost all of the statements of the President and congressmen, as well as for many others, we have been able to provide the Court with official texts. In some cases, however, we rely on press reports of the statements of officials and public events. We have not cited these reports for the opinions or characterizations of the journalists who wrote them. Professor Brownlie will discuss the legal significance of these various categories of evidence in detail tomorrow.

In the present phase, Nicaragua has presented the testimony of six witnesses. Mr. Chamorro's evidence was in the form of an affidavit, because his attorneys advised him that leaving the United States to appear here in person could prejudice his application for permanent resident status.

The testimony of these witnesses is offered to fill in some of the contours of the documentary case with the immediacy that can only come from direct participation in events. Nicaragua accords this evidence the highest significance. The Court has seen the witnesses first hand and had the opportunity to question them and test their credibility. In this present review of the evidence we propose to emphasize the bearing of this testimony, since the documentary evidence has been analysed at length in the written pleadings.

My colleagues and I have considered how we can best assist the Court at this stage in approaching the great mass of evidence and documentation before it. Nicaragua has already summarized the evidence in chronological form at several stages of the case. Attached to the Application was a Chronological Appendix recounting the facts on which the Nicaraguan claims are based from February 1981 to 9 April 1984, the date of the filing of the Application. This chronology was amplified and brought up to date in the Memorial of Nicaragua on the Merits, filed on 30 April 1985 (paras. 26-150). A further chronological supplement, incorporating new evidence that has come to light since 30 April was submitted to the Court in advance of these oral proceedings (see Supp., Ann. A). In each case, the chronology is supported at every point by detailed references to the documentary evidence before the Court.

In these circumstances, Mr. President, there seems little reason to begin the oral pleadings with yet another chronological narrative of the events in issue. Instead, Nicaragua has tried to identify a few overarching propositions that we believe represent the central factual elements of the case. Our purpose today is to summarize and marshal the evidence in the record in support of each of these propositions, so that the Court can "satisfy itself" in the language of Article 53 of their soundness.

With the Court's permission, I will first set out these central propositions:

1. The United States conceived, created and organized a mercenary army, the contra *force.* It recruited the troops, organized them in operational divisions, established a unified military command, and controlled the growth of the force.

2. The Government of the United States has armed, equipped and trained the contra *force.* It has provided substantially all of the weapons, equipment, supply, training and funding for this force, and has determined both the kinds and amount of military material needed to send the *contras* into the field.

3. The Government of the United States has devised the strategy and directed the tactics of the contra *force.*

4. The Government of the United States provides direct combat support for the military operations of the contra *force.*

5. The political leadership of the contras *was hand-picked, installed and paid by the United States, both to ensure United States control and to generate congressional and public support for the administration's policies.*

6. United States military and intelligence personnel conducted direct attacks against Nicaragua including destruction of its oil supply system and the mining of its harbours.

7. The actions of the United States reflects policy decisions and priorities established at the highest levels of the current United States administration and executed under its supervision. In no sense can they be regarded as an aberration or the unauthorized activities of subordinates.

8. The purpose of the policy and the actions against Nicaragua in pursuance of this policy was, from the beginning, to overthrow the Government of Nicaragua.

Mr. Reichler will deal with the first four of these factual propositions; I will cover the last four.

Before turning the podium over to Mr. Reichler, however, I would like to say a preliminary word about the last of these propositions — the purpose of the United States Government in undertaking, at the initiative of its highest officials and with their full knowledge and approval, a co-ordinated campaign of force against a small country, extending over four years, and including the widespread use of terror, sabotage and atrocity as deliberate tactics. The evidence shows that the animating purpose of all these actions was to destabilize the present

Government of Nicaragua, and to replace it with a régime that was acceptable to the present Administration in the United States. From the beginning, it was the form and character of the duly constituted Government of Nicaragua that offended the United States Administration and was unacceptable to it. The policies and actions shown in this record cannot be characterized as self-defence in response to an "armed attack" on the United States or any other State. Nor were they designed to interdict a supposed flow of arms from Nicaragua to insurgents in El Salvador. The myth of "arms flow" and "arms interdiction", as the evidence shows, was invented at the very outset of the programme as a cover story to mask the real purpose which would have been unacceptable to the Congress and people of the United States along with the rest of the world.

I said a moment ago that the record before you contains a mass of complex material. But all of it falls into place once we understand this dominant purpose which runs like a *leitmotif* through all of the concrete policies and activities in the case. The entire body of the evidence is instinct with this purpose and, in the end, it is this purpose which must condemn the United States at the bar of this Court.

I now ask the President to call on Mr. Reichler.

ARGUMENT OF MR. REICHLER

COUNSEL FOR THE GOVERNMENT OF NICARAGUA

Mr. REICHLER: Mr. President, Members of the Court, may it please the Court. As Professor Chayes has stated, my task is to summarize the evidence presented to the Court with respect to the first four factual propositions identified by Professor Chayes. Because of the large volume of evidence in this case, time and consideration for the Court's patience require me to bring to the Court's attention today only a small part of this evidence. In an effort to be of maximum assistance to the Court I have chosen to emphasize the evidence that has been submitted most recently, specifically the testimony of the witnesses and the supplemental annexes presented to the Court on 10 September which, of course, were not discussed or analysed in Nicaragua's Memorial of 30 April.

In the course of my remarks I will make specific reference to some of the more significant documentary exhibits that Nicaragua has submitted. But I will spare the Court the burden of listening to the precise record citations for all of the evidence that I will discuss. These citations, I trust, will be included in the written record of my remarks. With the Court's permission, I will now proceed to the first factual proposition.

I. THE GOVERNMENT OF THE UNITED STATES CONCEIVED AND CREATED THE *CONTRA* FORCE

The evidence before the Court proves that the *contras* owe their very existence, as a military force, to the United States. This is openly acknowledged by senior officials of the United States Government and by members of the United States Congress with access to all relevant information. As expressed by representative Wyche Fowler, a member of the Intelligence Committee of the House of Representatives which is responsible for oversight of all military and paramilitary activities against Nicaragua, "There was no indigenous uprising of Nicaraguans against the Sandinista Government before the United States decided to finance such an uprising" (that is in Ann. E, Attachment 3, 129 *Cong. Rec.* H5752 (27 July 1983)).

The evidence shows that the United States made its decision to finance an uprising against the Nicaraguan Government in the Fall of 1981. A plan for military and paramilitary activities against Nicaragua was prepared by the Latin American Affairs Division of the CIA. David MacMichael, a CIA intelligence analyst who was advised of the plan at that time, has testified that the plan called for the CIA to create a paramilitary force, consisting initially of 1,500 men, to carry out armed attacks and sabotage in and against Nicaragua (pp. 43-44; pp. 49-51, *supra*). Mr. MacMichael has confirmed the accuracy of certain excerpts from the plan itself and its accompanying classified memoranda, which were published in the newspapers in the United States (p. 49, *supra*; Ann. F, Nos. 4, 23, 36, 187, at pp. 6-7, 47-49, 67-71, 281-83). These documents proposed an initial allocation to the CIA of 19,950,000 dollars for the creation of a 1,500-man force, but carefully advised "more money and more manpower will be needed". From the very beginning, the record shows, the CIA treated the relationship between more money and more manpower as one of cause and effect. The official documents describing the CIA plan further stated that the CIA would "build popular support in Central America and Nicaragua for an opposition front that would be nationalistic, anti-Cuban and anti-Somoza; support the opposition front through formation and training of action teams to collect intelligence and engage in paramilitary and political operations in Nicaragua and elsewhere; work primarily through non-Americans to achieve the foregoing, but in some circumstances the CIA might take unilateral paramilitary action — possibly using United States personnel — against special Cuban targets" (Ann. F, Nos. 23, 36, at pp. 47-49, 67-71; see also p. 49, *supra*).

It is now a matter of public record in the United States that President Reagan approved the CIA's plan at a meeting of the National Security Council on 16 November 1981. On 23 November, one week later, the President signed National Security Decision Directive 17, which put the plan into immediate effect. As required by domestic United States law, a Presidential finding was sent to the Intelligence Committees of the Senate and the House of Representatives, and the members of the Committees were orally briefed by CIA officials. The Intelligence Committee of the House of Representatives later published a report describing the implementation of the plan in the following way: "encouragement and support has been provided to foster insurgency within Nicaragua" (Ann. F, Attachment 1, House Intelligence Committee Report, IV, p. 244, 13 May 1983). The existence of this plan, its essential nature and purpose, its approval by the President and the fact of its implementation have all been confirmed for the Court by Mr. MacMichael (pp. 43-44; 49, *supra*).

The evidence demonstrates that, pursuant to the plan, the CIA recruited and organized a paramilitary force consisting initially of Nicaraguans who had belonged to the National Guard, the armed forces under the Somoza Government (pp. 14; 49, 59-60, *supra*; Ann. F, No. 4, pp. 6-7). Many were living in exile in the United States and various Central American countries. Some of them existed as armed bands along the Nicaragua-Honduras border (*ibid.*).

The evidence firmly establishes, as representative Fowler reported, that these scattered bands of ex-National Guardsmen did not themselves constitute an insurgency against the Nicaraguan Government prior to the CIA's involvement with them. They were militarily and politically insignificant. Commander Carrion testified that, until December 1981:

> "they were just a few small bands very poorly armed, scattered along the northern border of Nicaragua and they were composed mainly of ex-members of the Somoza's National Guard. They did not have any military effectiveness and what they mainly did was rustling cattle and killing some civilians near the border lines" (p. 13, *supra*).

This is confirmed by the contemporaneous public statements of United States Government officials, who were describing the ex-Guardsmen at that time, to take one example, as "insects buzzing around the Sandinistas' ankles" (Ann. F, No. 188). A similar description was given by the former *contra* leader Edgar Chamorro, who had first-hand knowledge of the status of these groups. Mr. Chamorro, the Court will recall from his affidavit, was appointed by the CIA to a leadership position in the *contra* organization:

> "At the time, the ex-National Guardsmen were divided into several small bands operating along the Nicaragua-Honduras border . . . the bands were poorly armed and equipped, and thoroughly disorganized. They were not

an effective military force and represented no more than a minor irritant to the Nicaraguan Government." (Supp. Ann. G, para. 7.)

Mr. Chamorro's affidavit states that the CIA began its efforts to join these bands into an effective military force several months before its formal plan for covert military and paramilitary actions against Nicaragua was submitted to President Reagan. Mr. Chamorro has further testified that a senior United States Government official, General Vernon Walters, personally met with the leaders of these bands and promised that they would receive United States assistance and support if they joined together in a single organization (Supp. Ann. G, para. 6). General Walters is currently the United States Ambassador to the United Nations. At that time, he was a special assistant to the Secretary of State with ambassadorial rank. He had previously been Deputy Director of the CIA.

General Walters and CIA officials also sought to merge the Union Democratica Nicaraguense, or "Nicaraguan Democratic Union", a political organization of anti-Sandinista Nicaraguan exiles living in Miami, Florida, with the ex-National Guardsmen who had already been brought together by General Walters. According to Mr. Chamorro, then a leader of the UDN, General Walters told his group:

> "that the United States Government was prepared to help us remove the FSLN from power in Nicaragua, but that, as a condition for receiving this help, we had to join forces with the ex-National Guardsmen . . . We were well aware of the crimes the Guardsmen had committed against the Nicaraguan people while in the service of President Somoza, and we wanted nothing to do with them. However, we recognized that without help from the United States Government we had no chance of removing the Sandinistas from power, so we eventually acceded to the CIA's, and General Walters', insistence that we join forces with the Guardsmen." (Supp. Ann. G, para. 6.)

Mr. Chamorro goes on:

> "The merger . . . was accomplished in August 1981 at a meeting in Guatemala City, Guatemala, where formal documents were signed. The meeting was arranged and the documents were prepared by the CIA. The new organization was called the Fuerza Democratica Nicaraguense ('Nicaraguan Democratic Force') or by its Spanish acronym, FDN. It was to be headed by a political junta . . . The name of the organization, the members of the political junta, and the members of the general staff were all chosen or approved by the CIA." (Supp. Ann. G, para. 7.)

The CIA was thus mother, father and midwife to the FDN. Once the CIA's plan was approved by President Reagan, the United States Government provided the newly created FDN with the assistance and support that had been promised by General Walters and others. Mr. Chamorro testified:

> "Soon after the merger, the FDN began to receive a substantial and steady flow of financial, military and other assistance from the CIA. Former National Guardsmen who had sought exile in El Salvador, Guatemala and the United States after the fall of the Somoza Government were recruited to enlarge the military component of the organization. They were offered regular salaries, the funds for which were supplied by the CIA." (Supp. Ann. G, para. 8.)

Commander Carrion informed the Court of the amounts of these salaries; they:

> "ranged from 300 dollars a month for the common soldier . . . up to 1,500 dollars a month for the higher officers. These officers were also put as leaders

> and commanders of the commanding structure and the operational military units." (P. 15, *supra*.)

By the end of 1981, the CIA's dominant role in creating, organizing and recruiting the *contra* military force was evident. Commander Carrion testified that:

> "After December 1981 we began to observe that [the] *contras* started to act on the basis of their centralized plans, military training camps were set up in Honduras and in the United States for training the *contras*, new weapons were delivered to the *contra* forces and the centralized command was set up." (P. 13, *supra*.)

In December 1981, the FDN launched its first organized attack against Nicaragua. Code named "Red Christmas", it was the first time the *contras* operated pursuant to any kind of military plan, let alone one with a name (p. 14).

The evidence shows that at the time of the Red Christmas attack, the *contras* had approximately 1,000 to 1,200 men (p. 29, *supra*). More money and more men were to follow, and the two were closely linked. The record establishes that in 1982 the United States Government provided another 30 milllion dollars for covert military and paramilitary activities against Nicaragua; the May 1983 Report of the House of Representatives Intelligence Committee (Ann. E, Attachment 1, IV, p. 249) states that the funding was secretly approved by Congress in August 1982. As a consequence, by the end of the year — 1982 — the *contra* force grew to approximately 3,500 to 4,000 men (Carrion testimony, p. 14, *supra*; see also Ann. F, No. 36, p. 70). In 1983, the United States provided another 24 million dollars, expressly for military and paramilitary activities in Nicaragua, and the *contra* force grew correspondingly to more than 7,000 men. The 24-million dollar appropriation was done openly, by direct Congressional action, and became part of domestic United States law. Since United States support for the *contras* was no longer covert — all of its essential features had been revealed in the United States press and acknowledged by United States officials — there was no longer any reason for the Congress to keep it hidden. Section 108 of the Intelligence Authorization Act for Fiscal Year 1984, enacted into law on 9 December 1983, therefore expressly provided:

> "During fiscal year 1984, not more than $24,000,000 of the funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual." (Ann. D, Attachment 4.)

That is a statute of the United States.

In addition to the funds provided by the United States, which totalled more than 70 million dollars from the approval of the CIA's plan in the Fall of 1981 until the end of 1983, a principal reason for the rapid growth in the *contra* force was the method of recruitment used. Many of the *contra* fighters were recruited by force. Commander Carrión gave vivid testimony regarding these recruitment practices. Here is the testimony of Mr. Chamorro:

> "FDN units would arrive at an undefended village, assemble all the residents in the town square and then proceed to kill — in full view of the others — all persons suspected of working for the Nicaraguan Government or the FSLN, including police, local militia members, party members, health workers, teachers, and farmers from government sponsored co-operatives.

> In this atmosphere, it was not difficult to persuade those able-bodied men left alive to return with the FDN units to their base camps in Honduras and enlist in the force. This was, unfortunately, a widespread practice that accounted for many recruits." (Supp. Ann. G, para. 9.)

These recruits provided the foot-soldiers for what had become, by virtue of the CIA's efforts and resources, a thoroughly integrated, well-organized and well-equipped army. The contrast with the scattered, disorganized and poorly-armed bands of ex-Guardsmen that the CIA started with was dramatic. In place of a few rag-tag groups of armed bandits roaming the remote countryside and thieving cattle, there was now a fully fledged army functioning under a single and unified command. The structure of this army was described by Commander Carrion:

> "The head of this command was something called a joint staff major; this joint staff major was conformed by a CIA officer known as Colonel Raymond and by Enrique Bermudez who is in charge of the military operations on the part of the *contras*. Under this joint command, there is a complex system of different services for the military combat units. They have a medical service, a public communications service; they have what they call civilian services, a supply centre and what they call the strategic command which is the operational head structure. Under the strategic command there is a logistic section, a school section, that is a training section, a special forces section — what they call internal forces, air force section, and what is known as the tactical operations command. Under this tactical operations command are the operational military units which are called regional commands. The regional commands have perfectly well-defined operational areas where they normally act and they are the superior structure under which are the so-called task forces. Each regional command has under its command three or four task forces which are then subdivided into smaller units. This is then the structure corresponding to a fairly well-developed army and up to this point, that is what the *contra* is, a very well-equipped and organized army." (P. 19, *supra*.)

This well-developed army — which, as Commander Carrion testified, was organized along the lines of North American, not Latin American militaries — did not evolve independently. As I have discussed, the evidence establishes that the *contra* army was the conception and creation of the United States Government. This is confirmed by, among others, Mr. Chamorro, who was eye-witness to the growth and development of the *contra* forces and the influence of the United States:

> "1982 was a year of transition for the FDN. From a collection of small disorganized and ineffectual bands of ex-National Guardsmen, the FDN grew into a well-organized, well-armed, well-equipped and well-trained fighting force of approximately 4,000 men capable of inflicting great harm on Nicaragua. This was due entirely to the CIA, which organized, equipped, trained and supplied us." (Supp. Ann. G, para. 9.)

In sum, the evidence conclusively establishes the validity of the first proposition: that the *contra* military force was conceived and created by the United States Government. It was, to put it simply — but accurately — made in the USA.

II. THE GOVERNMENT OF THE UNITED STATES HAS ARMED, EQUIPPED AND TRAINED THE *CONTRA* FORCE

The evidence establishes the complete dependence of the *contra* force on the

United States for its arms, equipment and training, three critical elements of its military capacity. Mr. Chamorro's testimony directly addresses this point:

> "The FDN received all of its weapons from the CIA." (Supp. Ann. G, para. 9.)
>
> "The FDN never received money to purchase arms, ammunition or military equipment. These were acquired for us and delivered directly to us by the CIA. One of the senior agents at the CIA's Tegucigalpa [that's the capital of Honduras] station, known to us as 'the Colonel', was an expert in these matters, and he, together with his assistants, determined what we needed and obtained it for us, including: arms, ammunition, uniforms, boots, radio equipment, etc. As long as I was in Honduras (until June 1984), the FDN never acquired its own arms, ammunition or military equipment. We were just the end receivers." (*Ibid.*, para. 17.)

Mr. Chamorro's testimony is corroborated by the declaration, to the *New York Times*, of a United States Government official described as "closely linked to the rebels". This official, subsequently identified as Lieutenant Colonel Oliver North of the National Security Council, described the impact on the *contras* of legislation in October 1984, legislation that resulted in direct operational control of the *contras* passing from the CIA to the National Security Council:

> "When the agency pulled out of this programme, these guys didn't know how to buy a Band-Aid. They knew nothing of logistics, the CIA had been doing all of that." (Supp. Ann. D, No. 54, p. 64.)

The evidence shows that the *contras* received far more than Band-Aids from the CIA. Commander Carrion described the impressive arsenal of weapons the CIA delivered to the *contras*:

> "Prior to the end of 1981 the *contras* had the weapons they had taken from Nicaragua when the National Guards abandoned and fled to other Central American countries. But when the CIA needed new weapons for the increasing *contra* force, the CIA just got the weapons, FAL rifles, as I said before, and delivered these weapons to them. That was in the beginning."

One of the *contras'* own supply officers, Captain Armando Lopez, described the CIA's first delivery of 92 FAL rifles, four machine guns and two mortars to the *contras* in the following manner: "We were all hugging, we forgot about rank. We kissed our weapons. It seemed like a dream." (Ann. F, No. 196, p. 299.)

The record shows that this was just the beginning. As Commander Carrion continued:

> "Afterwards CIA AK 47 rifles — which are also very modern assault rifles — were given to the *contras*. The *contras* never had to buy weapons in the market. The CIA has always supplied them. And recently the CIA is supplying the *contras* with a G 3 rifle, which is the German equivalent to the FAL rifle, and it is the one that they are supplying right now. They supply not only rifles, but other types of weapons too. They supply them with a disposable rocket launcher called a light offensive weapon or LOW, with a grenade launcher called M 79 grenade launcher, they supply them with mortars of 60 millimetres and 81 millimetres — the last one is considered as medium range, in the practical sense, an artillery weapon. They also supply them with heavy machine guns, mostly M 60. All of these are made in the United States and came directly from the United States to the *contras* in Honduras. They also supplied the *contras* with all sorts of high-powered explosives, mainly the plastic explosive known as C 4 and mines of all sorts.

> anti-personnel mines, anti-carrier mines, of different sizes and types and TNT and other explosive devices for sabotage." (Pp. 19-20, *supra*.)

Captain Lopez of the *contras* described their reaction to these CIA weapons deliveries: "In 1983 we felt like one who had won the lottery. We lacked shoulders to carry all the weapons we got." (Ann. F, No. 1986, p. 299.)

The CIA not only supplied weapons to the *contras*, it trained them in how to use the weapons, and it provided them with a full range of military training. The Report of the House of Representatives Intelligence Committee of May 1983 acknowledged the CIA's training function:

> "There has been a hidden program of the Central American policy, however, which has had important consequences for the viability of the public policy. This hidden program is the nominally covert provision of US support and training to anti-Sandinista insurgents." (Ann. E, Attachment 1, Report of the House Committee on Intelligence, 13 May 1983.)

Mr. Chamorro described some of this training in his Affidavit:

> "Most of the C.I.A. operatives who worked with us in Honduras were Military trainers and advisers. Our troops were trained in guerrilla warfare, sabotage, demolitions, and in the use of a variety of weapons, including assault rifles, machine guns, mortars, grenade launchers and explosives, such as Claymore mines." (Supp. Ann. G, para. 18.)

Mr. Chamorro added that: "A special unit was created for sabotage, especially demolitions; it was trained directly by CIA personnel at Lepaterique, near Tegucigalpa." (Supp. Ann. G, para. 8.) Commander Carrión testified that the Nicaraguan Government has been able to identify "at least" 11 United States citizens — CIA agents — working with the *contras* in Honduras (p. 28, *supra*). Mr. Chamorro testified that there were "about 20" CIA Agents working directly with the *contras* (Supp. Ann. G, para. 16.)

The evidence establishes that the *contras* received no military training before the CIA entered the picture. From early 1982 until the beginning of 1984, the CIA paid at least 10 Argentinians — ex-members of the armed forces of that country — to help train the *contras*. Two of these Argentinians were former colonels — Santiago Villejas and Oswaldo Rivero, also known as Ballita. (Carrión testimony, p. 27, *supra*; Suppl. Ann. G, para. 8). The evidence shows that the Argentinians were recruited to serve as a cover for United States Government involvement with the *contras*. When the CIA plan was still under discussion, the United States Secretary of State Alexander Haig expressed the concern that the programme was "too large to hide" and he insisted that a third party be found to manage it so that the United States could plausibly deny its responsibility (Ann. F, No. 197, pp. 281-283). It was at that time, and for that reason, that the Argentinians were recruited. By the middle of 1983, however, as I indicated previously, the CIA's role with the *contras* was public knowledge in the United States. In the words of the Minority Leader of the House of Representatives, it was "about as covert as an elephant standing on a football field" (Ann. E, Attachment 3, 129 *Cong. Rec.* H5738, 27 July 1983 (remarks of Rep. Robert Michel)). Accordingly, by 1984 the Argentinians were no longer needed and the CIA was itself exercising full responsibility for all military and paramilitary training of the *contra* forces.

In sum, the evidence before the Court fully demonstrates the validity of what Representative James Wright, Majority Leader of the United States House of Representatives and a member of the Intelligence Committee, reported to his fellow legislators: the *contras* were "recruited, trained, financed, equipped, and sent into" Nicaragua by the United States Government (Ann. E, Attachment 4, 129 *Cong. Rec.* H5837, 28 July 1983). This is not simply a case of the *contras* receiving some arms, some ammunition, some supplies or some training from the United States. This is a case, fully supported by the evidence, where the United States provided all of the arms, all of the ammunition, all of the supplies and all of the training and as I shall now proceed to show, much more as well.

III. THE GOVERNMENT OF THE UNITED STATES HAS DEVISED AND DIRECTED THE MILITARY STRATEGIES AND TACTICS OF THE *CONTRA* FORCE

The evidence presented to the Court establishes, beyond question, that the United States has made all of the critical decisions concerning the strategic objectives and military tactics employed by the *contras*.

A review of the various *contra* offensives makes this obvious. In the first place, the timing of each of these offensives was determined by the United States. Every *contra* offensive was preceded by a new infusion of funds from the United States, starting with the first one in December 1981, which came about shortly after President Reagan authorized 19,950,000 dollars for these activities. The December 1982 offensive was preceded by an appropriation of 30 million dollars. The December 1983 offensive was preceded by the provision of 24 million dollars. There were no funds provided at the end of 1984; consequently there was no offensive. An additional 27 million dollars was approved at the beginning of June 1985; the *contras* launched an offensive two weeks later.

The specific strategic objectives and the tactics employed in these offensives were also dictated by the United States. As I have already discussed, in late 1981 the CIA forged a single military organization out of scattered, diverse armed groups and created a unified command structure. That enabled the *contras*, for the first time, to operate under an orchestrated military plan, which the CIA code named "Red Christmas". This first attempt to take and hold Nicaraguan territory failed.

The CIA's strategy during the first half of 1982 emphasized the use of hit-and-run raids and sabotage. Commander Carrión has described the demolition of two key bridges on 14 March 1982, over the Rio Negro in Chinandega province and the Rio Coco in Nueva Segovia, near the Pan American Highway (p. 14, *supra*). CIA officials expressly acknowledged the Agency's responsibility for the destruction of these two bridges in briefings given to the Intelligence Committee of the House of Representatives in May 1982 (Ann. F, No. 36, pp. 67-71; No. 188, pp. 284-287). These attacks, along with similar sabotage raids on other bridges, fuel tanks, a customs warehouse, government buildings and other targets, are also described in a classified *Weekly Intelligence Summary* of the United States Defense Intelligence Agency, which was later published in the newspapers in the United States (Ann. C, Attachment III-2).

After these successful sabotage raids in early 1982, a National Security Council *Summary Paper* prepared in April 1982 reported that: "In Nicaragua, the Sandinistas are under increased pressure as a result of our covert efforts." (Ann. C, Attachment III-1.) That document, as well, was later published in the newspapers in the United States.

At the end of 1982, the CIA determined that the *contra* forces were sufficiently organized, trained and equipped to implement a new strategic objective. The new plan, called "C plan" or "Strategy of Terror", was an offensive designed to take over the town of Jalapa in the far north of Nicaragua, install a "provisional government" there, and call for international recognition. Commander Carrion testified that to carry out this plan.

> "they concentrated the troops around Jalapa right on the border line and from there they did many attacks with artillery support . . . they were not able to take over Jalapa, but as a result of this offensive many towns were put under artillery fire and there were many civilian casualties as well as military casualties." (P. 16, *supra*.)

Mr. Chamorro confirmed that the CIA was behind the strategy:

> "By the end of 1982, we were ready to launch our first major military offensive designed to take and hold Nicaraguan territory, which the CIA was urging us to do. Our principal objective was the town of Jalapa." (Supp. Ann. G, para. 9.)

After the failure of the 1982 offensive, the CIA changed its strategy. The new strategy was to penetrate *contra* forces deeper into the interior of Nicaragua, disrupt life within the country as much as possible, and thus foster political destabilization. During 1983, CIA officials, including the Director of Central Intelligence, William Casey, travelled to Honduras and instructed the *contras* that they must begin to conduct a "classic guerrilla war" (Ann. F, No. 157, p. 247; No. 48, pp. 89-90). Afterwards, Commander Carrión testified, the *contras*

> "started to infiltrate groups, small groups at first, deeper into Nicaraguan territory where they would have more objectives within reach let's say — state farms, co-operatives, grain stores, health centres and so on — and it is during this period . . . that ambushes occurred on the road against any vehicle, civilian or military." (P. 16, *supra*.)

United States authorship of this strategy is evident from the fact, corroborated by various sources, that the CIA, for the first time, furnished the *contras* with aeroplanes without which the *contra* units could not have been resupplied and therefore maintained inside Nicaragua for the extended periods of time necessary to carry out the plan (*ibid.*). United States direction of strategy and tactics is further confirmed by the fact that the *contras* themselves opposed this strategy but were compelled to accept it.

Mr. Chamorro testified that after the failure of the 1982 offensive, the FDN's officers wanted more time to regroup and prepare themselves at their base camps in Honduras before returning to Nicaragua: "The FDN officers were overruled by the CIA, however. The agency told us that we had to move our men back into Nicaragua and keep fighting. We had no choice but to obey." (Supp. Ann. G, para. 19.)

In September 1983, President Reagan sent a new finding to the Congressional Inteligence Committees to support his request for more funds to finance the *contras'* activities, a request that the Congress ultimately approved (Ann. D, Attachments 3 and 4 (Department of Defense Appropriations Act for FY 1984, Sec. 775, Intelligence Authorization Act for FY 1984, Sec. 108)). His finding set forth a new strategy: the destruction of vital economic installations and the infliction of maximum harm on the Nicaraguan economy (Ann. F, No. 47, p. 88). This strategy was publicly disclosed the following month by Representative Lee Hamilton of the Intelligence Committee of the House of Representatives: "We now see a new strategy. That strategy is to target economic targets like electrical plants and storage facilities." (Ann. C, Attachment 5, 130 *Cong. Rec.* H8416, 20 Oct., 1983.) Previously, Mr. Chamorro testified, the *contras* were instructed by the CIA to avoid such targets because attacking them might be politically counter-productive (Supp. Ann. G, para. 19). Now, however, the CIA instructed the *contras* to attack coffee plantations and coffee pickers, in order to interfere with the cultivation and harvesting of Nicaragua's lifeblood export crop. Mr. Chamorro testified that the *contras* followed this instruction (Supp. Ann. G, para. 19), and Commander Carrion confirmed that the coffee crop in fact suffered significantly from such attacks, especially in the first half of 1984 (p. 18, *supra*).

The CIA also decided at this time to target Nicaragua's supply of oil, as a key element of its new emphasis on economic targets. Mr. Chamorro testified that the CIA official in overall charge of the *contra* operation, Duane Clarridge, told the *contra* leadership that,

> "something must be done to cut off Nicaragua's oil supplies, because without oil the Nicaraguan military would be immobilized and its capacity to resist our forces would be drastically reduced" (Supp. Ann. G, para. 20).

This plan, which ultimately included assaults on oil pipelines and storage tanks, and the mining of Nicaragua's ports, was undertaken directly by United States military and intelligence personnel, rather than the *contras*, and will be discussed by Professor Chayes later. I mention it here as a further illustration of the United States direction of the strategy and tactics of the military activities against Nicaragua.

Still more proof of this lies in the fact that the *contra* offensive launched at the end of 1983 was preceded by direct instructions from Duane Clarridge to stage a major attack on Nicaragua, seize some territory, however small, and declare a provisional government that would then be recognized by the United States (Supp. Ann. G, para. 22). The plan was called "Plan Sierra" and was aimed — as in 1982 — at taking Jalapa. Commander Carrión described this offensive to the Court in some detail (pp. 18-19, *supra*). Like the earlier effort to take Jalapa, it failed, although numerous casualities were inflicted on both civilian and military objectives (*ibid.*).

The most recent *contra* offensive, launched in June of this year, was called "Plan Repunte" or "Come Back Plan". It, too, reflects United States control over the *contras'* strategy and tactics. As described by Commander Carrión, the plan called for the *contras* to penetrate deeper into Nicaragua than they ever before attempted, and attack important economic targets and populated areas in order "to create an impression of political crisis and to portray the Government as incapapable of holding control of the situation" (p. 23, *supra*). Here again, the dependence of the plan on frequent and abundant resupply of *contra* units by air deep inside Nicaragua, and on precise intelligence pinpointing the location of Nicaraguan Government troops — all of which could only be provided by the United States — demonstrates that it was a strategy necessarily designed by the United States.

In addition to dictating the general and specific strategic objectives of the *contras*, the United States also instructed the *contras* on the field tactics to be employed by their forces. In the military sense, these tactics were determined by the amount and type of weapons the *contras* received, all of which came from the United States. But the United States directly influenced the tactics of the *contras* on the ground in other ways as well.

The widespread use of terror tactics by the *contras* is not open to dispute. These tactics are thoroughly documented in the reports of several independent human rights organizations and fact-finding missions, which are included in Annex I. Professor Glennon has testified about the findings of his *in loco* investigation. The Court has heard Father Loison's account of *contra* terror he encountered while living and working in La Trinidad. Even CIA officials have acknowledged, in testimony before Congressional committees, that the *contras* have committed these abuses including rapes, torture and murder of unarmed civilians, including children (Ann. F, No. 165, p. 257). Mr. Chamorro has admitted that it was standard *contra* practice to kill prisoners and suspected Sandinista collaborators (Supp. Ann. G, para. 27).

The record demonstrates with equal force that the *contras* adopted these tactics with the advice, encouragement and approval of the United States. Mr. Chamorro has testified:

> "The CIA did not discourage such tactics. To the contrary, the Agency severely criticized me when I admitted to the press that the FDN had regularly kidnapped and executed agrarian reform workers and civilians. We were told that the only way to defeat the Sandinistas was to use the tactics the Agency attributed to 'Communist' insurgencies elsewhere: kill, kidnap, rob and torture." (Supp. Ann. G, para. 27.)

Such madness was not without its method. It had a very clear purpose. Commander Carrión testified that,

> "All of these terrorist instructions have the main purpose of alienating the population from the Government through creating a climate of terror and fear so that nobody would dare to support the Government." (P. 17, *supra*.)

In order to instruct the *contra* forces in these tactics the CIA prepared a manual called *Psychological Operations in Guerrilla Warfare*. It is before the Court in Annex G. The CIA's authorship of this document was publicly confirmed by, among other authoritative sources, the Intelligence Committee of the United States House of Representatives (Ann. E, Attachment 17 (Committee Report No. 98-1196, 2 January 1985)). The Court will undoubtedly recall the testimony that Commander Carrión gave on 12 September when he read aloud excerpts from this manual, especially from the section that is entitled "Implicit and Explicit Terror" (p. 17, *supra*). I do not believe it is necessary to quote further from this appalling pamphlet. It is in evidence and it speaks for itself.

The evidence demonstrates that the instructions in the CIA's manual were widely followed, in some cases literally, by the *contras*. About 2,000 copies were distributed among their forces, and the contents of the manual were discussed at special sessions held by *contra* units (Supp. Ann. G, para. 28; p. 17, *supra*). Commander Carrión testified that "There are hundreds of examples of *contra* activities following the manual's instructions", and he gave several specific examples of local civilian leaders, in some way affiliated with the Nicaraguan Government or the Sandinista Party, who were assassinated by the *contras* as set out in the manual (p. 18, *supra*). Mr. Chamorro confirmed the *contras'* use of the manual:

> "the practices advocated in the manual were employed by FDN troops. Many civilians were killed in cold blood. Many others were tortured, mutilated, raped, robbed or otherwise abused." (Supp. Ann. G, para. 28.)

The reports of various independent human rights organizations, which, as I mentioned earlier, are collected in Annex I, provide the names of victims and specific accounts of their individual tragedies.

The record shows that the *contras* have continued to follow the recommendations in the manual. As recently as 1 August 1985, *contra* forces attacked the town of Cuapa and, after making the townspeople report to the centre of town, took 12 local militiamen and town officials and marched them off to a ditch outside the town, where they executed 11 of them, throwing the bodies in the ditch (Supp. Ann. D, No. 36, p. 47).

United States responsibility for acts of terrorism by the *contras* rests not only on the fact that senior United States officials know what the *contras* do with the funds, weapons and equipment with which the United States continues to supply them — a fact that Professor Glennon's testimony establishes (p. 78, *supra*). But United States responsibility rests as well, and to an even greater extent, on the direction and control that the United States exercises over the *contra* forces and on the United States role in actively setting in motion these acts, especially through the preparation and dissemination of the CIA manual on *Psychological Operations in Guerrilla Warfare*.

IV. THE GOVERNMENT OF THE UNITED STATES HAS PROVIDED DIRECT AND CRITICAL COMBAT SUPPORT FOR THE MILITARY OPERATIONS OF THE *CONTRAS*

The evidence not only establishes that the United States directly supports the day-to-day military operations of the *contras* in the field, it also shows that this support is so critical to the *contras* that without it, their capacity to operate with any degree of effectiveness would be severely diminished. This combat support includes:

(1) the logistical supply and maintenance of *contra* forces operating in the field;
(2) the collection, analysis, and utilization of intelligence data, including determination of the precise location of Nicaraguan Government troops; and
(3) the design and operation of field communications, including the provision of sophisticated codes and communications procedures, that enable *contra* units to co-ordinate their attacks without fear of detection by Nicaraguan Government troops.

The evidence shows that the United States has organized, managed and controlled all logistical arrangements for *contra* forces in the field. On 12 September, Commander Carrión described this logistical operation, and its relationship to the *contras'* military activities inside Nicaragua, in considerable detail. He testified that the *contras* were able to infiltrate and maintain forces deep inside Nicaragua in 1983 and thereafter because:

> "the CIA had perfected their logistic systems, especially because they had given the *contras* several aeroplanes which they could now use to resupply the military units operating deep within the country" (p. 16, *supra*).

Commander Carrión testified further that "United States involvement in these air supply operations is very clear", citing: delivery by the United States of the planes used in the supply missions; United States improvements to the airstrip at Aguacate, from where the planes operate; information supplied by a captured member of a *contra* aeroplane crew, brought down over Nicaragua, and confirmed by other sources which revealed that a United States officer known as Major West co-ordinated the entire supply operation; and that another United States officer was involved in packing the supplies before they were placed on the aeroplane (pp. 16-17, *supra*).

Commander Carrión's testimony was corroborated by Mr. Chamorro, who testified:

> "The United States Government also made it possible for us to resupply our troops inside Nicaragua, thus permitting them to remain longer inside

> the country. Under cover of military maneuvers in Honduras during 1983, United States armed forces personnel constructed airstrips, including the one at Aguacate, that, after the CIA provided us with aeroplanes, were instrumental in resupplying our troops." (See also Ann. F, No. 62, p. 110; Ann. F, No. 180, p. 272.)

The evidence shows that the United States also provides the *contras* on a regular basis, with detailed intelligence reports on the location and movements of government troops. Mr. Chamorro explained how this intelligence is collected and passed on to the *contras*, and its importance to *contra* military operations:

> "The CIA, working with United States military personnel, operated various electronic interception stations in Honduras for the purpose of intercepting radio and telephonic communications among Nicaraguan Government military units. By means of these interception activities, and by breaking the Nicaraguan Government codes, the CIA was able to determine — and to advise us of — the precise locations of all Nicaraguan Government military units. The information obtained by the CIA in this manner was ordinarily corroborated by overflights of Nicaraguan territory by United States satellites and sophisticated surveillance aircraft. With this information, our own forces knew the areas in which they could safely operate free of government troops. If our units were instructed to do battle with government troops, they knew where to set up ambushes, because the CIA informed them of the precise routes the government troops would take. This type of intelligence was invaluable to us. Without it, our forces would not have been able to operate with any degree of effectiveness inside Nicaragua." (Supp. Ann. G, para. 18.)

The United States Government has openly acknowledged its intelligence gathering activities; in late 1982, for example, Jeane Kirkpatrick, then United States Ambassador to the United Nations, admitted, during a United Nations Security Council debate, that the United States conducted regular reconnaissance flights over Nicaraguan territory (37 UN *SCOR* (2335th mtg.), p. 48, UN doc. S/PV 2335/Corr.1 (1982)).

The United States also provided the *contras* with a sophisticated field communications system that was equally critical to their combat operations. As Commander Carrion testified:

> "There was much assistance in the communications area. In the first place, the United States provided the *contras* with very modern and effective military communications systems. They gave them different types of equipment — equipment that is used for communications between the regional commands and the tactical operations command, or strategic command, those are usually PRC-77 back radios which can be carried on the back. Also the use of a shortwave radio, South Quartz is the name of it, and they also give the *contras* small walkie-talkies for communications among the small units within a task force or regional command. But I would say that the most important assistance in the communications field has been the preparing of some sophisticated codes for the *contras* to cover their communications. They also prepare for them conversational tables which are simpler codes for less important communications. The *contras* had no capacity at all for preparing or manufacturing these types of codes." (Pp. 20-21, *supra*.)

Mr. Chamorro explained the importance of the communications facilities provided by the United States:

> "This was critical to our military operations because it enabled various units, or task forces, to communicate with each other, and to co-ordinate their activities, without being detected by the Sandinistas. Without this communications capacity, our forces inside Nicaragua would not have been able to co-ordinate their activities with one another and they would have been unable to launch effective strikes at the designated targets." (Supp. Ann. G, para. 18.)

The dependence of the *contra* forces on the United States is also demonstrated by the course of *contra* military operations following each new appropriation of United States funds for their activities. Commander Carrion described this in the following manner:

> "At the end of 1982, the *contras* received new funds from the United States amounting to $30 million. From this date on, we started to notice that a more or less regular pattern was emerging and that was that after every infusion of funds, the *contras* would launch a new major offensive against my country. The offensive would gradually diminish as the funds were being used up until the new infusion came, when the pattern would repeat itself." (P. 16, *supra*.)

As I have already mentioned, the fact that there was no *contra* offensive at the end of 1984 was directly attributable to the refusal of the Congress to appropriate more funds at that time. All evidentiary sources agree — and by that I mean the Nicaraguan Government, the United States Government, and the *contras'* own spokespersons — that by the end of 1984 the funds most recently appropriated by the Congress — that is in December 1983 — had been exhausted (pp. 22-23, *supra*; Ann. F, No. 61, p. 109; No. 177, p. 269; No. 115, p. 202; No. 121, p. 210). Perhaps nothing more powerfully demonstrates the *contras'* complete dependence on the United States than the fact — also agreed on by all sides — that the *contras'* military operations against Nicaragua dropped off dramatically from the end of 1984 until the Congress resumed funding in June 1985.

In February 1985, in the middle of this period, Enrique Bermudez, the *contras'* military commander, stated publicly that the failure of the United States Congress to appropriate funds forced the *contras* to reduce their combat operations by more than half. He said: "Some forces are paralysed. We have had moments of crisis, not all places at once, but problems nonetheless." He said failure of the Congress to renew funding "would have a devasting psychological effect" on the *contra* forces (Ann. F, No. 177, p. 269). Commander Carrion confirmed this:

> "*Q.* . . . how could you tell that the absence of additional financial support from the United States resulted in a fall off of activity?
>
> *A.* Well, first the decrease in the level of military activity showed up in the daily report we have in my country, Nicaragua; but also from personal interviews and interception of *contras'* communications we know that there were many *contra* leaders who were complaining about the lack of supplies. We captured many *contras* very poorly equipped, uniforms worn out and with very few rounds of ammunition, etc., that make it evident that they were not receiving at least as much supplies as they used to receive years before, but there was even demoralization among the *contras* forces." (Pp. 22-23, *supra*.)

During this period, because of legislation enacted by the Congress in October 1984, operational control of the *contras* was shifted from the CIA to the National

Security Council, and Lt. Col. Oliver North of the NSC was placed in charge. Mr. Chamorro has stated that Lt. Col. North assured the *contras* at their headquarters in Honduras that "the planning of the operations would continue very close to the NSC" (Supp. Ann. D, No. 47, p. 57). Subsequently, according to a senior United States official, the National Security Council did provide planning and exert "tactical influence" over *contra* military operations, and Lt. Col. North personally gave the *contras* advice and direction on specific attacks, including, in particular, the assault on a passenger ferryboat that connects the river towns of El Rama and Bluefields (Supp. Ann. D, No. 42, p. 50; No. 55, p. 65). National Security Adviser Robert MacFarlane publicly defended Lt. Col. North's activities; he said: "We had a national interest in keeping in touch with what was going on, and second, in not breaking faith with the freedom fighters" (Supp. Ann. D, No. 50, p. 58). Representative George E. Brown, Jr., a member of the Intelligence Committee of the House of Representatives, stated that the Administration's provision of military advice to the *contras* violated a now lapsed United States law, but concluded that "If the President wants to use the NSC to operate the war in Nicaragua, I don't think there's any way we can control it" (Supp. Ann. D, No. 42, p. 50).

Representative Anthony Beilenson, another member of the Intelligence Committee of the House of Representatives, said: "It just makes it unmistakably clear that it's our war. They are waging it in every way except with American troops." (Supp. Ann. D, No. 46, p. 54.)

This, of course, is precisely what the evidence in this case conclusively establishes, with one exception: on numerous well-documented occasions military and paramilitary attacks against Nicaragua have been waged directly by American military and intelligence personnel, as Professor Chayes will discuss.

The totality of the evidence, therefore, supports Commander Carrion's characterization of the *contras* as:

> "an artificial force, artificially set up by the United States, that exists only because it counts on United States direction, on United States training, on United States assistance, on United States weapons, on United States everything. Without that kind of support and direction the *contras* would simply disband, disorganized, and thus lose their military capacity in a very short time." (Pp. 24-25, *supra*.)

Very similar testimony was given by General Paul F. Gorman, commanding officer of the United States Southern Command headquarters in Panama, which has responsibility for all United States armed forces in Central America and the Caribbean. General Gorman testified before the Armed Services Committee of the United States Senate on 27 February 1985. He told the Committee that unless the *contras* received continued support from the United States, "the campaign will begin to peter out, wear down" (Ann. F, No. 130). Without continued support from the United States in all the forms in which it has been given, and is being given, the *contra* force simply could not survive. While there is abundant evidence in support of this proposition, Mr. Chamorro's testimony, based on his personal knowledge and experience, addresses this point directly, and it is an appropriate place to conclude my remarks:

> "When I agreed to join to FDN in 1981, I had hoped that it would be an organization of Nicaraguans, controlled by Nicaraguans, and dedicated to our own objectives which we ourselves would determine. I joined on the understanding that the United States Government would supply us the means necessary to defeat the Sandinistas and replace them as a government.

> but I believed that we would be our own masters. I turned out to be mistaken. The FDN turned out to be an instrument of the United States Government and, specifically, of the CIA. It was created by the CIA, it was supplied, equipped, armed and trained by the CIA and its activities — both political and military — were directed and controlled by the CIA. Those Nicaraguans who were chosen by the CIA for leadership positions within the organization — namely, Calero and Bermudez — were those who best demonstrated their willingness to unquestioningly follow the instructions of the CIA. They, like the organization itself, became nothing more than executioner of the CIA's orders. The organization became so thoroughly dependent on the United States Government and its continued support that, if that support were terminated, the organization would not only be incapable of conducting any military or paramilitary activities against Nicaragua, but it would immediately begin to disintegrate. It could not exist without the support and direction of the United States Government." (Supp. Ann. G, para. 30.)

Mr. President, Members of the Court, that is precisely what the evidence in this case establishes.

The Court adjourned from 11.20 to 11.40 a.m.

QUESTION PUT BY JUDGE SCHWEBEL

The PRESIDENT: Before I give the floor to Professor Chayes, there is a question that Judge Schwebel would like to ask. As this is a question not to a witness, it could be answered in writing later.

Judge SCHWEBEL: I should like to put a question which in my view flows from Mr. Reichler's argument which he may find it suitable to answer now or subsequently, or which the Agent of Nicaragua may rather prefer to treat, and it is this. I can provisionally accept the claim on the basis of the data as I have so far had time to examine it — there is a great deal still to read — that before December 1981, the bands of the contras were an insignificant force. But my current tentative understanding equally is that the insurgency in El Salvador was insignificant before the Sandinistas came to power in 1979. But thereafter the character, my understanding is, of the insurgency in El Salvador radically changed, so that by January 1981, the insurgents posed a massive challenge to the El Salvador Government. Now it is claimed that the difference in vital measure derived from the Sandinistas who allegedly supplied arms from Nicaragua to El Salvadoran insurgents and who permitted the establishment of the leadership of the Salvadoran insurgents in safe command centres in Nicaragua — I have not heard that allegation contested by the way — and who it is alleged collaborated in the training of insurgents. Then came the January 1981 offensive which was hailed by an insurgent radio station, allegedly operating from Nicaraguan soil, and it is claimed that Radio Managua broadcast this on the day of the offensive:

> "A few hours after the FMLN general command ordered a final offensive to defeat the regime established by the military christian democratic junta, the first victories in the combat waged by our forces began being reported."

And that claim broadcast from Managua radio is found in *Revolution Beyond our Borders: Sandinista Intervention in Central America*, at page 20, a publication of the United States Department of State of this month.

It is argued that this Nicaraguan collaboration on the organization of the insurgency in El Salvador preceded by more than a year the organization by the United States of the insurgency in Nicaragua. In a sense then, there is an argument of mirror images, except the first image to appear in the mirror, it is argued, is that of Nicaragua. Could the Agent or counsel of Nicaragua comment on that line of argument which I do not necessarily accept but which I am obliged by the intendment of Article 53 of the Statute to consider?

Mr. ARGÜELLO GÓMEZ: Mr. President, Judge Schwebel. As with many questions raised in the past days, I feel it my duty as an Agent to answer them in my Agent's speech. I think it in any case more appropriate, due to the nature of the question, that as Agent I should answer than that the lawyers should answer.

ARGUMENT OF PROFESSOR CHAYES *(cont.)*

COUNSEL FOR THE GOVERNMENT OF NICARAGUA

Professor CHAYES: Mr. President, Members of the Court. As I said at the outset, I will deal with the last four of the eight central propositions that we feel are demonstrated by the evidence. Like Mr. Reichler, I will not burden the Court with extensive citations, but the references to the evidence have been supplied to the Registrar and will appear at the appropriate points in the transcript.

V. The Political Leadership of the *Contras* Was Hand-Picked, Installed and Paid by the United States, Both to Ensure Control and to Generate Congressional and Public Support for the Administration's Policy

The most cogent evidence about the political arm of the FDN is to be found in the affidavit of Mr. Chamorro who was a participant in the events from the summer of 1981 until November 1984, when he was fired by the CIA. Most of that time he was a member of the political directorate. I am going to follow along in Mr. Chamorro's own words and there will be citations to the principal corroborating evidence.

Mr. Reichler has already described the origin of the FDN in a merger, dictated by the CIA, between the Union Democratica Nicaraguense, a group of Nicaraguan exiles in the United States, loosely organized under the leadership of José Fransisco Cardenal, and bands of ex-National Guardsmen who had been conducting sporadic raids along the Honduran border since the fall of Somoza. The merger took place in August 1981 and a political junta consisting of Cardenal and two others was established by the CIA.

In little more than a year, the junta had outlived its usefulness. Cardenal resigned because he found "that he had no control over Bermudez or the other members of the FDN general staff, who answered only to the CIA" (Supp. Ann. G, para. 10). Mr. Chamorro recounts how he was approached in November 1982 by a CIA agent who purported to be "speaking in the name of the President of the United States". The agent asked him "to become a member of the political directorate of the FDN, which the CIA had decided to create as a substitute for the political junta" (Supp. Ann. G, para. 11; see also Ann. F, No. 191, p. 293). The reason was,

> "that the FDN had a bad image in the United States, and particularly among members of Congress, because it was perceived as an organization of ex-National Guardsmen. He told me that in order to maintain the support of the Congress for the CIA's activities it was necessary to replace the political junta with a group of prominent Nicaraguan citizens who had no ties with the National Guard or the Somoza Government." (Supp. Ann. G, para. 11.)

A *Newsweek* article published at the same time reports that "*contra* attacks are designed to harass the Sandinistas while CIA operatives cast around for a moderate new Nicaraguan leadership" (Ann. F, No. 13, p. 22).

The size of the new directorate was set at seven because the CIA felt that "any larger group would be unmanageable". Although the agents discussed possible candidates with Mr. Chamorro, "it was obvious" he says, "that they had already decided who they wanted" (Supp. Ann. G, para. 13; see also Ann. F, No. 191, p. 293; *ibid.*, No. 188, p. 285). The new leadership was organized in haste because, "the CIA was worried that Congress might enact legislation" as in fact it did,

> "to prohibit the use of United States funds for the purpose of overthrowing the Nicaraguan Government, and the creation of a political directorate composed of prominent respectable citizens might persuade the Congress not to enact such legislation" (Supp. Ann. G, para. 13).

The policies and programme of the organization were dictated by the CIA. The initial statement of principles and goals was rewritten by a CIA officer and Mr. Chamorro says "I had to read his words" at a press conference held on 8 December 1982. "In January 1983, at the instruction of CIA agent Thomas Castillo, we put out a 12-point 'peace initiative' drafted by the CIA which essentially demanded the surrender of the Sandinista government." (Supp. Ann. G, para. 14.)

The CIA paid the political leadership of the FDN from the very beginning. Cardenal began receiving payments from the first half of 1981 (Supp. Ann. G, para. 6). Mr. Chamorro tells us that "The CIA paid me a salary of $2,000 a month to support myself and family, plus expenses. Similar arrangements were made with other FDN directors." (Supp. Ann. G, para. 15; Ann. F, Nos. 149, 191, pp. 239, 293.)

A principal function of the directorate, as far as the CIA was concerned, was to influence United States opinion and the United States Congress. The organization continued to be heavily engaged in promoting legislation for funding the *contras*:

> "Our CIA colleagues enlisted us in an effort to 'lobby' the Congress to resume these appropriations. I attended meetings at which CIA officials told us that we could change the vote of many members of Congress if we knew how to 'sell' our case and place them in the position of 'looking soft on Communism'. They told us exactly what to say and which members of Congress to say it to. They also instructed us to contact certain prominent individuals in the home districts of various members of Congress as a means of bringing pressure on these members to change their votes." (Supp. Ann. G, para. 26; see also Ann. F, Nos. 149, 187, pp. 239, 281.)

Mr. Chamorro also tells us how, when he was managing the FDN's communications office in Honduras, he was given money from the CIA "to bribe Honduran journalists and broadcasters to write and speak favourably about the FDN and to attack the Government of Nicaragua and call for its overthrow". He learned from the CIA that the same tactics were being used in Costa Rica (Supp. Ann. G, para. 16). The Court will recall Mr. MacMichael's testimony that it was a common technique for the Agency to plant such stories abroad and then get them reprinted in United States newspapers as an aspect of the element of "disinformation" that is part of every covert programme (p. 56, *supra*).

The judgment and wishes of the Nicaraguans were repeatedly overridden by their American masters. Chamorro thought that the January 1983 peace offer "was premature, but Castillo insisted that it be done to get the FDN favourable publicity" (Supp. Ann. G, para. 16). The directorate was not even permitted to select their own headquarters.

> "We wanted to set up a highly visible headquarters in a shopping centre

> or office building, but the CIA did not like this idea. They said it would become a target for demonstrations and violence. They insisted that we take an elegant suite at the David Williams Hotel in Coral Gables, Florida, which the CIA paid for." (Supp. Ann. G, para. 15.)

The CIA installed as the real leader of the directorate "another Nicaraguan", recently arrived from Nicaragua where he "had been working for the CIA . . . for a long time" (Supp. Ann. G, para. 14; Ann. F, No. 188, p. 285), that was Mr. Calero. Captain Armando Lopez, head of *contra* logistics said of Mr. Calero's appointment: "The benefactor had to find something to guarantee his investment." (Ann. F, No. 196, p. 299.)

The political directorate was also forced to cover for the CIA when, as I shall describe below, the United States launched its campaign of direct attacks against Nicaraguan harbours, ports and oil storage facilities in the Fall of 1983. "Although the FDN had nothing whatsoever to do with this operation, we were instructed by the CIA to publicly claim responsibility in order to cover the CIA's involvement." (Supp. Ann. G, para. 21.) False press releases were issued on CIA orders after the attacks on Puerto Sandino in September and October 1983, the attack on Corinto in October 1983, and the attacks on Potosi in January 1984. On 5 January 1984, Mr. Chamorro says:

> "at 2.00 a.m. the CIA deputy station chief of Tegucigalpa woke me up at my house in Tegucigalpa and handed me a press release in excellent Spanish. I was surprised to read that we — the FDN — were taking credit for having mined several Nicaraguan harbours." (Supp. Ann. G, para. 24.)

The Agency wooed Eden Pastora, who remained outside the FDN, because it thought his record as a former Sandinista leader would make him politically attractive. In the end, it decided that he was "unmanageable" (Ann. F, No. 188, p. 285) and terminated funds to his Revolutionary Democratic Alliance Group (ARDE). Pastora's comment was: "I had only one problem with the CIA. I did not speak English well enought to say 'Yes, Sir'" (*ibid.*, p. 284).

Mr. Chamorro also fell victim to the CIA insistence on control. In early 1984 he became increasingly troubled by reports of *contra* atrocities. His objections were ignored until finally, in June 1984,

> "I acknowledged to a newspaper reporter that our troops had killed some civilians and executed some prisoners, though I tried to explain these practices as best I could. Calero told me I could no longer work in Honduras and I was re-assigned to the local FDN committee in Miami. I was given nothing to do and I no longer had much interest in working for the FDN, or to be more accurate, for the CIA." (Supp. Ann. G, para. 29.)

In November 1984 he was fired (*ibid.*, para. 31).

Mr. Reichler has already read the closing paragraphs of Mr. Chamorro's affidavit recording his disillusioned realization that the organization he helped to found "turned out to be an instrument of the United States Government and, specifically, of the CIA" (Supp. Ann. G, para. 30).

VI. United States Military and Intelligence Personnel Conducted Direct Attacks Against Nicaragua, Including the Destruction of Its Oil Supplies and Supply Facilities and the Mining of Its Harbours

In the summer of 1983, the CIA was seeking "a quicker and more effective way of hurting the Sandinistas than previous efforts" (Ann. F, No. 51, p. 94).

As a result, they hired and trained a special group of commandos, known as Unilaterally Controlled Latino Assets (UCLAs), to carry out a series of attacks against Nicaraguan ports, power plants, bridges and oil facilities. As is indicated by their name, these UCLAs were employees of the United States Government and were under the CIA's direct control (Ann. F, No. 48, p. 89; No. 70, p. 121; No. 100, p. 171; No. 188, p. 286).

Mr. Chamorro described a meeting during that period, that is the summer of 1983, between the FDN political directorate and Duane Clarridge, the CIA manager of the cover operation. Here is his description:

> "Clarridge told us that the C.I.A. had decided that something must be done to cut off Nicaragua's oil supplies, because without oil the Nicaraguan military would be immobilized and its capacity to resist our forces would be drastically reduced. Clarridge spoke of various alternatives. He said the agency was considering a plan 'to sink ships' bringing oil to Nicaragua . . . and 'an attack on Nicaragua's sole oil refinery, located near Managua . . . Finally, Clarridge said that the Agency had decided on a plan to attack the oil pipeline at Puerto Sandino, on Nicaragua's Pacific Coast where the oil tankers delivering oil to Nicaragua discharge their cargoes." (Supp. Ann. G, para. 20.)

Operations under this plan began on 8 September 1983, when the UCLAs, true to Clarridge's word, blew up the Puerto Sandino pipeline (Supp. Ann. G, para. 21; Carrion testimony, p. 21, *supra*; see also Ann. F, No. 98, p. 168; No. 99, p. 169; Nos. 192-193, pp. 295-297; Supp. Ann. B, para. 21; Ann. J, Attachment 1).

On 10 October 1983, the UCLAs executed a more ambitious attack on Corinto, Nicaragua's main port. Commander Carrion testified:

> "In October of that same year several speedboats armed with 20-millimetre cannons attacked oil storage facilities in the port of Corinto, which . . . is the main port of Nicaragua. As a result of the attack the three big oil-storage tanks were set on fire. This fire was a very big one and put in peril the whole Corinto population, which is around 20,000 people, and they had to be evacuated from the town to some place else. Many millions of gallons of oil were lost, and the oil storage tanks were completely destroyed." (P. 21, *supra*; see also Supp. Ann. G, para. 21; Ann. F, No. 50, p. 92; No. 98, p. 168; No. 99, p. 169; Nos. 192-193, pp. 295-297.)

On 14 October the UCLAs returned to Puerto Sandino, and again attacked the pipeline there. In all, there were three attempts to blow up that pipeline (p. 21, *supra*; see also Ann. J, Attachment 1).

Therafter, between 1 January and 10 April 1984, the CIA carried out at least 19 separate attacks on a variety of Nicaraguan coastal economic targets. The UCLA operated from armed CIA speedboats and helicopters directed by United States intelligence and military personnel aboard a CIA ship stationed just outside Nicaraguan territorial waters (Ann. F, No. 72, p. 125; No. 81, p. 140; No. 94, p. 160; No. 104, p. 176; No. 116, p. 203; No. 191, p. 292). When CIA Director William Casey was asked who was directing the operation and picking the targets, he answered, "We are". (Ann. F, No. 105, p. 188.)

An internal CIA memorandum describes these attacks and provides detailed evidence of the United States role (Ann. C, Attachment III-3). For example, the first entry on that memorandum describes the attack on the Nicaraguan naval base at Potosi on 4 January 1984, as follows:

> "Helicopter rockets and 'Q' boat ('Q' boat was the name for the speedboat)

> attack against the Potosi naval base . . . 'Q' boat crewed by agents and personnel from Central America. United States helicopter and crew identified targets which were taken under fire by Nicaraguan crewed helicopter. CIA crewed Merlin aircraft equipped with FLIR (forward looking infrared radar) provided real time intelligence support.
>
> Major terminal was hit several times by 'Q' boat cannon fire . . . Rockets set fire and caused damage to buildings within the compound. Nicaraguans admitted to one dead and eight wounded." (Ann. C, Attachment III-3.)

The accounts of the other attacks are equally vivid and equally candid.

Meanwhile, a plan including the mining of Nicaragua's ports was presented to President Reagan with the strong recommendation of National Security Adviser Robert C. McFarlane. It was specifically approved by the President in December 1983 (Ann. F, Nos. 81, 94, 104, pp. 140, 161, 179; see also Ann. E, Attachment 9). It was an integral part of the operation against Nicaraguan ports and shipping facilities that was already under way.

The Central Intelligence Agency carried out the mining from January to April of 1984. The mines were made by the CIA Weapons Group and tested by the Mines Division of the Naval Surface Weapons Center of the United States Navy. They were deployed, as in the earlier attacks, by the specially trained UCLAs (Ann. F, No. 72, p. 125; No. 81, p. 140; No. 94, p. 160; No. 104, p. 176; No. 116, p. 203; No. 191, p. 292; see also Supp. Ann. G, para. 21).

When the United States role in the operations was made public in April 1984, one member of the Senate Intelligence Committee reacted:

> "We have carefully monitored these activities to insure that whatever else happened, Americans didn't get into combat-type operations against Nicaragua . . . That distinction has been lost. When an American is on the mother ship in a mining operation, he's involved directly in military activities." (Ann. F, No. 72, p. 125; see also No. 89, p. 153, No. 190, p. 289.)

Senator Goldwater was more succinct: "This is an act violating international law. It is an act of war." (Ann. E, Attachment 9.)

Judge Jennings expressed an interest in the duration of the mining. The mines were first deployed on 4 January 1984, and deployment continued through the end of March (Ann. F, No. 190, p. 289). The first mine exploded on 25 February 1984; the last on 30 March 1984 (Ann. J, Attachment 1). However, Administration and congressional sources said in early April that "these mines will remain active in Nicaraguan harbours until they decay in several months" (Ann. F, No. 87, p. 15).

Commander Carrión testified that 12 vessels and fishing trawlers were damaged by the mines. Two persons were killed and 14 injured (p. 22, *supra*; see also Ann. F, No. 104, p. 176; No. 191, p. 292).

Although Nicaragua has not yet presented comprehensive proof in support of its claim for compensation, there is a considerable body of evidence in this record concerning the economic damage caused by these attacks. In 1983 80 per cent of all Nicaraguan foreign trade passed through Nicaraguan ports and almost all this activity was through Corinto or Puerto Sandino. Oil imports play a particularly important role, accounting for 40 per cent of the foreign exchange Nicaragua earns through its exports (Ann. J, Attachment 1). In addition to the oil supplies actually destroyed in the *contra* attacks, Exxon stopped sending its tankers into Nicaraguan ports after the raid on Corinto (Ann. F, No. 188, p. 287). The very existence of the mines and the uncertainties about their deactivation hampered Nicaraguan trade and jeopardized the delivery of Nicaraguan oil supplies for some months (Ann. F, No. 125, p. 214).

As I pointed out above, the evidence shows that the *contras* never had anything to do with either the mining or the other UCLA attacks. Mr. Chamorro was instructed by the CIA to read the press release claiming responsibility for the mining over the FDN clandestine radio (Supp. Ann. G, para. 24), thereby allowing the CIA to conceal the United States direct military action against Nicaragua for many months.

Other forms of direct United States action against Nicaragua include a variety of activities expressly designed to intimidate the Nicaraguan people and Government. The United States has conducted military manœuvres in Honduras almost continuously since February 1983. These manœuvres are on an unprecedented scale, involving thousands of United States soldiers, tanks and heavy artillery. Many have been accompanied by simultaneous naval manœuvres executed by aircraft carriers, battleships and destroyers off Nicaragua's coasts. Commander Carrión described some of these actions in his testimony (p. 22, *supra*); they are also documented elsewhere in the record (Ann. F, No. 41, p. 76, No. 150, p. 240; Supp. Ann. D, No. 10, pp. 11-13; No. 169, p. 261).

The evidence shows that these manœuvres were conceived as part of a programme of "perception management", a term coined apparently by the CIA or the Defense Department, intended to alarm and intimidate the Nicaraguan Government. This programme was outlined in a classified 1983 Defense Department document: the title of the document was *Document on Central American Initiatives*. The existence of the programme was confirmed by senior Defense Department and Administration officials: "Every time there's an invasion scare, they (the Nicaraguans) make some concessions." Or again, "We do our best to keep them concerned." Or again, "One of the central purposes (of the manœuvres) is to create fear of an invasion. (The American troops) push very close to the border, deliberately, to set off all the alarms." (Ann. F, No. 199, p. 303.) In June 1985, United States Colonel Pearcy, Joint Task Force Commander in Honduras, said that the manœuvres were partially intended to remind Nicaragua of American resolve (Supp. Ann. D, No. 10, p. 11).

Another component of the "perception management" programme was a series of overflights by a United States SR-71 reconnaissance 'plane causing sonic booms over Managua for four consecutive days in November 1984, at a time when the United States Administration was deliberately creating tensions between the two countries (p. 22, *supra*; Ann. F, No. 152, p. 242). Otto J. Reich, Ambassador for Latin American Public Diplomacy, confirmed that these booms were intended to frighten the people of Nicaragua (Ann. F, No. 199, p. 302).

VII. The Activities of the United States Reflect Policy Decisions and Priorities Established at the Highest Levels of the Current Administration and Executed under Its Supervision. In no Sense Can they Be Regarded as an Abberration or as the Unauthorized Activities of Subordinates

The evidence shows unequivocally, and Mr. Reichler has already recounted some of it, that the fundamental decisions in the United States military and paramilitary campaign against Nicaragua were made by the President of the United States personally, on the recommendation of senior cabinet secretaries and advisers. This is true not only as a matter of fact, but it is required by the positive provisions of United States law. I quote from Title 22 of the United States Code, section 2422:

> "No funds appropriate the authority of this chapter of any other Act may be expended by or on behalf of the Central Intelligence Agency for *operations* [that's what covert activities are called] in foreign countries. . . . unless and until the President finds that each such operation is important to the national security of the United States." (Ann. D, Attachment 2. Emphasis added.)

Title 50 of the US Code, section 413, states: "The finding must be reported to the Intelligence Committees of both the Senate and the House of Representatives." (*Ibid.*)

As Mr. Reichler has already said, the initial *contra* programme was approved by the President at a meeting of the National Security Council on 16 November 1981 (Ann. F, No. 4, pp. 6-7). It was embodied in National Security Decision Directive 17 (*ibid.*, No. 23, p. 48). The presidential finding required by law was made on 1 December 1981 (*ibid.*, No. 8; No. 13, p. 23; No. 187, p. 193; No. 36, p. 69). Subsequent major increases in the authorized force ceilings or changes in the force mission were also authorized by the President and reported to the appropriate congressional committees in accordance with this law (Ann. F, No. 8, p. 115; No. 13, p. 23).

Pursuant to the same law, the President, in December 1983, personally approved the destruction of Nicaraguan oil facilities and the mining of Nicaraguan harbours carried out over the next several months (Ann. F, No. 94, p. 16; No. 104, p. 179), although there is some question of how adequately that was reported to the Intelligence Committees. But in the end, Senator Goldwater, Chairman of the Senate Intelligence Committee, said in a public letter to Director Casey of the Central Intelligence Agency, "the CIA had, with the personal approval of the President, engaged in such mining" (Ann. E, Attachment 9; see also Ann. E, Attachment 8; Ann. F, No. 81, p. 140; No. 94, pp. 160-161).

By the same token, the Congress of the United States is a party to these policy decisions. As noted above, the applicable statute requires that the Intelligence Committees of both Houses be informed. In 1982, Congress secretly approved $30 million for the "covert war" (Ann. E, Attachment 1, House Intelligence Report, IV, p. 249). Since at least fiscal year 1984 (beginning 1 October 1983), all funds for the *contras* had been specifically and openly authorized by legislation enacted by the Congress (see Ann. D, Attachments 3, 4; Supp. Ann. C, Attachment 7). Congress was on ample notice, from the public statements of senior members of the Intelligence Committees exercising their functions of reporting to their colleagues before each such appropriation, as to the purposes for which the funds were to be used. For example, Representative Lee Hamilton, then a member of the House Intelligence Committee and now its Chairman, stated:

> "The *contras* aim to bring down the Sandinistas. We are now supporting a large army inside Nicaragua. We can no longer deny that we are fighting a mercenary war in Nicaragua to overthrow the Government of that country." (Ann. C, Attachment 3, 239 *Cong. Rec.* H5725, 27 July 1983.)

Although it was sometimes suggested that the CIA was out of control, Senator Goldwater firmly rejected that notion: "The CIA is like the rest of our intelligence family, a member of the Government, and they only do what they are told to do." (Ann. E, Attachment 15, p. S12865.)

Senator Wallop, also a member of the Senate Intelligence Committee, concurred:

> "They (the CIA) are not ginning up, generating, concocting what they are doing in Nicaragua on their own, without directions from the Reagan

> Administration. [I should say that Senator Wallop is a Republican and supports the policy.] Nor did they do so in the Carter Administration. They are doing what they are directed to do because they are an arm of United States foreign policy." (Ann. E, Attachment 15, p. S12865.)

Involvement at the highest levels of the United States Government was not confined to the mere authorization of actions. The evidence reveals that senior White House officials and other high officers of the Administration have been concerned with the on-going operations on an almost day-to-day basis. The mining plan, as I said, was approved on the affirmative recommendation of National Security Adviser Robert C. MacFarlane. CIA Director William Casey made many visits to the *contras* in Nicaragua, and once in 1983 he assured them personally that the Administration would stay with them. Indeed, one intelligence officer said "It's really Casey's war" (Ann. F, No. 161, p. 251).

A "restricted interagency group", known as the RIG, was formed to manage and supervise the operation. It was chaired by the Assistant Secretary of State for Inter-American Affairs, first Thomas Anders and later Langhorn Mobley. Marine Corps Lt. Col. Oliver C. North, Deputy Director of the National Security Council for Political Military Affairs, represented the White House. You have already heard of his activities from Mr. Reichler. Duane Clarridge, Director of the CIA's Office of Latin American Affairs, sat for the Agency.

Clarridge, also known as "Dewey Maroni" — his "nom de guerre" I suppose — was the day-to-day manager and moving spirit of the programme. His pervasive involvement with the *contra* operation is detailed in Annex F, Numbers 187, 188, 190, 191 and 193.

He made frequent trips to Honduras for meetings with *contra* field commanders, he negotiated with Eden Pastora to induce him to join, and he masterminded the establishment of the FDN political directorate (Supp. Ann. G, paras. 20-22; Ann. F, Nos. 187, 188, 191, 193). He "reported directly to Casey throughout, bypassing several senior officers in the intelligence communities' senior command, and he and Casey overrode whatever objections cropped up" (Ann. F, No. 187, p. 283).

Colonel North was also directly involved in FDN activities, but Mr. Reichler has already dealt with that. Another National Security Council official, Ronald F. Lehman, a Special Assistant to the President, and, I believe, brother to the Secretary of the Navy, visited the FDN leadership in Nicaragua in the spring of 1984 and assured them:

> "that President Reagan remained committed to removing the Sandinistas from power. He told us that President Reagan was unable at the time to publicly express the full extent of his commitment to us because of the upcoming presidential elections in the United States. But, Mr. Lehman told us, as soon as the elections were over, President Reagan would publicly endorse our effort to remove the Sandinistas from power and see to it that we received all the support that was necessary for that purpose." (Supp. Ann. G, para. 25.)

In 1985, the military and paramilitary activities against Nicaragua have become a major preoccupation of the current Administration and of President Reagan himself. Congressman Lee Hamilton, Chairman of the House Permanent Select Committee on Intelligence said:

> "The President has elevated the struggle to change the Sandinista government through military force to one of the highest priorities of his admin-

> istration." (Supp. Ann. C. Attachment 2, 131 *Cong. Rec.* H2358-2359 (23 April 1985).)

The Administration's heaviest artillery has been brought into play. Vice President Bush spoke in behalf of the *contras* on 25 January and again on 28 February. Mr. Casey spoke at the Metropolitan Club on 1 May and Secretary Shultz before the American Bar Association on 23 May (Supp. Ann. B, Attachment II-1).

President Reagan himself played a leading role in the final decision by Congress to restore funding for the *contras* on 12 June 1985. Between 7 February and 11 June, he made 22 separate major public statements, regarding aid to the *contras* and the need for changing the Nicaraguan Government (Ann. C, Attachments II-21; Supp. Ann. B, Attachments I-9; additions to Supp. Ann. B). He repeatedly referred to the *contras* as "freedom fighters" (see, e.g., Ann. C, Attachments I-5, **IV**, p. 172; I-13, **IV**, pp. 182-183; I-14, **IV**, pp. 183-184; I-15, **IV**, p. 185). He compared them with "the brave men and women of the French resistance" (Ann. C, Att. I-15, p. 4); he asserted that "they are our brothers" (Ann. C, Att. I-13; I-15, p. 4) and claimed them as "the moral equivalent of our founding fathers" (Ann. C, Att. I-15, p. 4).

The military and paramilitary activities of a 10,000-man covert army in a small country in Central America have evoked from the United States Government preoccupation — one might say almost obsession — at the highest levels, lavish expenditure of resources — a hundred million dollars in four years; and day-to-day supervision by senior operational officials. In the light of this combination it is hard to contend that the United States is not firmly in charge of the operations.

VIII. The Purpose of the Policy and the Actions Against Nicaragua Undertaken in Pursuance of It Was, from the Beginning, to Overthrow the Government of Nicaragua

Evidence in the record from a multitude of sources, both direct and indirect, is consistent and mutually corroborative that the overriding purpose of the United States military and paramilitary operations against Nicaragua was to destabilize the Government, force it to change its basic social policies, and ultimately to overthrow it. The notion that the programme was designed to interdict, or suppress, an alleged flow of arms from Nicaragua to the insurgents in El Salvador finds no basis in the record. The evidence supports Mr. MacMichael's testimony that the arms interdiction rationale was developed as a cover story to conceal the real purpose of the programme (pp. 49-51, 58, *supra*). This, in itself, reinforces the direct evidence establishing the true purpose of the operation.

The evidence of purpose falls into a number of categories and I will now deal with each of them separately.

A. Presidential Statements

The most explicit and notorious of these is the President's press conference answer, on 21 February 1985, to the direct question whether the purpose of United States policy in Nicaragua was to overthrow the Government. He replied: "Not if the present government would turn around and say, all right, if they'd say 'Uncle'." (Ann. C, Att. I-14, **IV**, p. 184.) Now, we have supplied a reference to a dictionary definition of that phrase "say 'Uncle'", and I think that is probably not necessary, but of course it is a colloquialism for surrender. When asked whether the goal of the United States policy was to "remove the Sandinista government", he answered:

> "Well, removed in the sense of its present structure, in which it is a communist totalitarian State, and it is not a government chosen by the people." (Ann. C, Attachment I-14, **IV**, p. 183.)

Numerous presidential statements only slightly less specific reiterate the same theme under a number of rubrics, for example, there are repeated references to the *contras* as "freedom fighters" (Ann. C, Attachments I-5, **IV**, p. 173; I-13, **IV**, p. 182; I-14, **IV**, p. 183; I-15, p. 4). There are repeated assertions that the Sandinistas are not a government, but merely a "faction" of the 1979 revolution (Ann. C, Attachment I-16, **IV**, p. 185; Attachment I-11, **IV**, p. 180; Attachment I-12, **IV**, p. 181; Supp. Ann. B, Attachment 4, **IV**, p. 383), and there are references to the need for "changing" the existing "totalitarian" régime into a "democratic" one (Ann. C, Attachment I-4, **IV**, p. 171; Attachment I-11, **IV**, p. 180; Attachment I-12, **IV**, p. 181; Attachment I-14, **IV**, p. 184; Supp. Ann. B, Attachment I-2, **IV**, p. 380; Attachment I-4, **IV**, p. 383; Attachment I-8). Most of these, incidentally, have emerged since the United States decided not to appear in this Court and was no longer so heavily under the obligation of maintaining the notion of collective self-defence.

B. Statements by Other High Administration Officials

The principal foreign policy officers of the current United States Administration have repeatedly used the same formulas as the President to describe the purpose of United States policy: for example, Vice President Bush, on 25 January 1985: "our support for those in Nicaragua who are fighting the communist Sandinistas must go forward" (Ann. C, Attachment II-8, **IV**, p. 214); Secretary of State George Shultz, 20 March 1984: "I also call upon the Congress to recognize the validity of the struggle of those Nicaraguans who are resisting totalitarianism" (Ann. C, Attachment II-3, **IV**, pp. 201-202). Secretary Shultz said on 19 February 1985:

> "What we have in Nicaragua is a government that's a bad-news government. Now, how can that get changed? We'd like to see them change. But they don't seem inclined to do so. So we have followed these alternatives and we will continue to follow these alternatives." (Ann. F, No. 176; see also *id.*, No. 175.)

Director of Central Intelligence William Casey said on 1 May 1985:

> "The increasingly united Democratic Nicaraguan Opposition, both internal and external, is the major obstacle to Sandinista consolidation. The armed resistance, popularly known as the *contras*, is a vital part of this movement. Together, these groups encourage erosion of support for the Sandinistas; create uncertainties about the future of the régime; challenge its claims to legitimacy; and give hope to the Nicaraguan people." (Supp. Ann. B, Attachment II-1, **IV**, p. 391.)

In the same speech, Mr. Casey referred to Nicaragua as an "occupied country" (p. 2). The Court may note also statements of other high Administration officials which are contained in the evidence. (Under Secretary of Defense Fred C. Ikle (12 September 1983), Ann. C, Attachment II-2; Assistant Secretary of State for Inter-American Affairs, Elliott Abrams (17 August 1985), Supp. Ann. D, Attachment 58; Deputy Assistant Secretary of Defense for Inter-American Affairs, Nestor D. Sanchez (27 August 1985), Add. to Supp. Ann. D. See also, generally, Ann. F, No. 58.)

C. *Congressional Statements*

That is the third category: Presidential statements, statements of high officials, Congressional statements. The record abounds in statements by senior members of the Congressional Intelligence Committee, both supporters and opponents of the Administration's policy affirming that its purpose has been to overthrow the Nicaraguan Government. Only a few can be given here. As early as May 1983, the report of the Permanent Select Committee on Intelligence of the House of Representatives said:

> "The activities and the purposes of the anti-Sandinista insurgents ultimately shape the program. Their openly acknowledged goal of overthrowing the Sandinistas, the size of their forces and efforts to increase such forces, and finally their activities now and while they were on the Nicaraguan-Honduran border, point not to arms interdiction, but to military confrontation." (Ann. E, Attachment 1, IV, pp. 251-252.)

The next statement of 23 July 1983 is from Representative Edward Boland who was then Chairman of the House Intelligence Committee: "the purpose and mission of the operation was to overthrow the Government of Nicaragua" (Ann. E, Attachment 3, p. H5748).

Here is a statement from Senator Malcolm Wallop, a supporter of the programme and a member of the Senate Intelligence Subcommittee:

> "I would hope that we do not give the erroneous impression that we have fostered the Nicaraguan assistance program solely to interdict arms for the war in El Salvador. That would cheapen both our motives and those of the Nicaraguans freedom fighting." (Ann. E, Attachment 15, p. S12865.)

Senator Patrick Leahy, Vice Chairman of the Senate Intelligence Committee, opened the debate on funding for Nicaragua on the floor of the Senate on 23 April 1985 as follows:

> "Mr. President, today the Senate is considering the most important foreign policy issue it will face this year: whether Congress will allow President Reagan to continue a covert war to overthrow the Government of Nicaragua." (Supp. Ann. C, Attachment 1, p. S4581.)

And finally, Mr. Lee Hamilton, Chairman of the House Intelligence Committee, said in the same debate in the House:

> "On February 21, President Reagan said that it was United States policy to seek to remove the Sandinista Government unless it changed its goals and present structure and allowed the *contras* into the government." (*Ibid.*, Supp. Ann. C, Attachment 2, pp. 2358-2359.)

To the same effect see, Annex E, Attachment 3, H5752; Attachment 4, H5833; Attachment 5, H8394; Attachment 13, S7516-7517; Supp. Ann. C, Attachment 1, S4582; Attachment 5, H4152; Attachment 5, H4173-4174.

D. *Statements Made to the* Contra *Leaders*

The *contra* leaders themselves say that they were told often by officials representing themselves as speaking for the President, that the objective was to overthrow the existing government of Nicaragua by force. "Managua by Christmas" was a familiar slogan among the *contras* (Ann. F, No. 188, p. 286; *id.*, No. 191, p. 293).

E. Strategy, Tactics and Targets of the Field Operations

The actual operations of the *contras* in the field are wholly inconsistent with the asserted purpose of arms interdiction. On the contrary, they are clearly designed and co-ordinated so as to sap the political and economic strength of the Government of Nicaragua.

First, the terrorism and atrocities, for which the evidence has already been reviewed by Mr. Reichler, are classic destabilizing tactics.

Secondly, again as explained by Mr. Reichler, a major objective of the annual offensives launched by the *contras* was to take and hold an area within Nicaragua where they could proclaim a provisional government that *contra* leaders were assured would be recognized by the United States (p. 16, *supra*; Supp. Ann. G, para. 22; Ann. F, No. 156, p. 246).

Thirdly, *contra* hit-and-run tactics were directed at targets of economic significance, including bridges, communications installations, the international airport at Managua and agricultural co-operatives. As CIA Director Casey said, commenting on the first of these attacks on the bridges on the Rio Negro and Rio Ocotal: "It takes relatively few people and little support to disrupt the internal peace and economic stability of a small country." (Ann. F, No. 36, p. 71.) The destruction of health and education facilities, which were also specially targeted for hit-and-run attacks, was similar in purpose (p. 17, *supra*; Ann. E, Attachment 5, H8416; Supp. Ann. D, No. 51, p. 94).

In 1984, as Commander Carrion testified, there was a special systematic effort to disrupt Nicaragua's export industries, in particular to prevent the harvesting and marketing of the coffee crop (Supp. Ann. G, para. 19; pp. 18-19, *supra*; Ann. I, Attachment 2, pp. 1-19).

Next, the direct actions by the United States against Puerto Sandino, Corinto and Potosi and the programme of mining Nicaragua's harbours were designed to disrupt the economy and intimidate both the Government and the people. Senator Leahy whom we have heard before said: "There's a lot of talk about not trying to overthrow the Government, but the facts speak for themselves. Unless you are trying to do this, why else would you mine their harbours?" (Ann. F, No. 80, p. 139.) The attacks, indeed, were part of a deliberate and systematic plan to destroy Nicaragua's oil-supply system. The campaign of perception management and intimidation, including the SR-71 sonic booms and the massive United States force deployments near Nicaragua's land and sea borders, were similarly intended. Now the last type of evidence demonstrating the purpose of the operation is sort of negative evidence.

F. The Evidence in the Record Provides no Support for the Proposition that Nicaragua Is Supplying Arms to the Insurgents in El Salvador

Under the terms of Article 53 of the Statute, the Applicant is in something of an odd position on this matter. The only legal justification ever advanced by the United States for its military and paramilitary activities against Nicaragua is that they represent an exercise of the inherent right of self-defense against the asserted supply of arms by Nicaragua to the guerrillas in El Salvador. In law, of course, this is a matter of affirmative defence. In a normal case, where the respondent had not refused to participate, the matter would not be before the Court at all unless the respondent formally placed it in issue in its pleadings. The respondent would have to support its allegations with concrete and specific proof and it would bear the burden of proof. Applicant would then have a full and fair opportunity to rebut the actual evidence relied on, and the Court would resolve any conflict on the basis of the record made by the parties.

Here Nicaragua must respond to shadows — vague and unsubstantiated assertions by the United States, made in other contexts and forums, without any specification of concrete evidence to support them. Nevertheless, in view of the provisions of Article 53, Nicaragua has felt it incumbent on it to try to assist the Court as best it can to deal with these scattered accusations and assertions.

Let us review the evidence of record on the issue of the supply of arms by Nicaragua to the Salvadoran rebels.

In the first place, the Government of Nicaragua maintains and has always maintained that it has never at any time supplied arms to the Salvadoran rebels. Father Miguel d'Escoto, Foreign Minister of Nicaragua, solemnly swore in his affidavit filed in this case:

> "In truth, my government is not engaged, and has not been engaged, in the provision of arms or supplies to either of the factions engaged in the civil war in El Salvador." (Ann. B, para. 1.)

The affidavit continues with a description of the efforts of the Nicaraguan Government — both unilateral and diplomatic — to suppress arms traffic across its territory and the difficulties attendant on that task. I think you will find those efforts to have been diligent.

Commander Luis Carrion, Vice Minister of the Interior of Nicaragua, and a member of the Government since 19 July 1979, when the Somoza régime was overthrown, testified in open Court, under the solemn declaration prescribed by Article 64 of the Rules:

> "My Government has never had a policy of sending arms to opposition forces in Central America. That does not mean that this did not happen, especially in the first years after the revolution in 1979 and 1980, weapons might have been carried through Nicaraguan territory, weapons that might have the Salvadoran insurgents, as you said, as their final recipient." (P. 31, *supra*.)

This has been Nicaragua's consistent position both before and during this case and, if I may say so, its lawyers have never acknowledged anything to the contrary.

Now what is the state of the other evidence in the record on this issue?

First, Mr. Chamorro, a leading member of the FDN political directorate during the entire period in question, said that the *contras* never saw any evidence of the supposed arms flow (Supp. Ann. G, para. 14). Although as shown above, the strategy and targets of the *contras* were wholly inconsistent with an arms interdiction mission, it is surely astonishing that in the entire four-year period, that the *contra* bands were roaming over large areas of Nicaragua and strategically positioned near the major arms routes, they made not a single interception of arms transported by land, sea or air. That could hardly be the case if there were indeed a sustained or substantial arms traffic, and there are reports in the record of independent investigations by journalists showing an absence of intercept by Salvadoran Government forces.

But the record contains direct evidence offered by Nicaragua, through the witness David MacMichael. Nicaragua believes that Mr. MacMichael is a credible witness — that is why it called him. He is eminently qualified to offer evidence on this subject. By background and experience, he is an expert on the very question that is the subject of the United States assertions: arms supply to guerrilla forces in the field.

He was an employee of the United States CIA during the most crucial period here in issue, 6 March 1981 to 3 April 1983. His position as Senior Estimates Officer, a member of the Analytic Group of the National Intelligence Council, put him near the very top of the process for analysing and evaluating intelligence within the United States Government. His official duties required him to monitor all intelligence traffic dealing with arms shipments between Nicaragua and El Salvador during that period. He had unlimited access to all intelligence information on that subject — including raw reports and data from the field, finished intelligence analyses and personal consultation with agents and colleagues. He was never denied access to any intelligence materials he asked to see (p. 52, *supra*).

His unequivocal testimony is that during this crucial period — from March 1981, more than eight months before President Reagan first approved the covert action programme, until he left the agency in April 1983 — there was no credible evidence of any shipment of arms by the Government of Nicaragua to the rebels in El Salvador. Let me review the examination on this point. I questioned Mr. MacMichael:

> "*Q.* All right. I want to direct your attention now to the period of your employment with the Agency; was there any credible evidence that during that period, March 1981 to April 1983, the Government of Nicaragua was sending arms to rebels in El Salvador?
>
> *A.* No.
>
> *Q.* Was there any substantial evidence that during this period arms were sent from or across Nicaraguan territory to rebels in El Salvador with the approval, authorization, condonation or ratification of the Nicaraguan Government?
>
> *A.* No, there is no evidence that would show that.
>
> *Q.* Was there any substantial evidence that during the same period, any significant shipments of arms were sent with the advance knowledge of the Government of Nicaragua from or across its territory to rebels in El Salvador?
>
> *A.* There is no such substantial evidence, no."

This testimony was not shaken despite vigorous questioning from the Court. Indeed, in the course of his response to these questions, Mr. MacMichael was able to demonstrate how flimsy some of the so-called evidence published by the United States in support of its allegations really was. Two more aspects of Mr. MacMichael's testimony should be adverted to here.

First, on direct examination in answer to questions put by me as counsel for Nicaragua, Mr. MacMichael testified that he did see evidence of arms traffic in the period of the so-called final offensive of the FMLN at the end of 1980 and the very beginning of 1981. He noted that at that time arms shipments were going to the Salvadoran rebels from other countries in the region, such as Costa Rica and Panama. When I asked him: "Does the evidence establish that the Government of Nicaragua was involved during this period?" he answered: "No, it does not establish it, but I could not rule it out." (P. 55, *supra*.)

When questioned by Judge Schwebel, Mr. MacMichael stated it as his opinion that the Government of Nicaragua was implicated in such traffic, a point which the Government of Nicaragua denies. But on both direct examination and in response to questions from the Bench, he maintained — and this is the critical point — that the evidence tending to show that there was arms traffic stopped abruptly after the end of the January 1981 "final offensive", well before the beginning of the United States military and paramilitary programme. And it has never resumed throughout the subsequent four-and-a-half years (*ibid.*). (See also independent studies conducted by journalists. Ann. F, No. 177, pp. 204-205; No. 120, p. 209.)

Second, Mr. MacMichael also reviewed for the Court the multitude of sophisticated intelligence sources and methods that the United States brought to bear on Nicaragua during this period. He said that the capabilities were very high indeed and that Nicaragua was a high priority intelligence target (p. 55, *supra*).

In view of these capabilities and priority, he stated that if arms in significant quantities were being sent from Nicaraguan territory to the rebels in El Salvador — with or without the Government's knowledge or consent — these shipments could not have been accomplished without detection by United States intelligence capabilities (*ibid.*).

The witness found the evidence adduced publicly by the United States to be "scanty". "Much of it", he continued, "is unreliable, some of it is suspect and I believe it has been presented in a deliberately misleading fashion on many occasions" (p. 56, *supra*). And in support of this characterization he pointed out that, despite the vast array of sophisticated intelligence devices available, what evidence has been presented consists in large part of newspaper stories (some of which may have been planted by the CIA in the foreign press), and statements of defectors, made after prolonged detention and interrogation by Salvadoran security forces.

Mr. MacMichael was present when the first covert action plan was discussed in the CIA in the Fall of 1981. He said that he became disturbed from the outset because, although arms interdiction was the "stated purpose" of the plan, no evidence was presented to show that such arms traffic was then in progress. Indeed, the CIA had not made and never did make the detailed and comprehensive investigation of the sources and routes of arms supply to the FMLN that good professional practice would have required (pp. 50-51, *supra*). As a result, Mr. MacMichael testified that from the outset the "stated purpose" of arms interdiction was "built into" this plan as a "plausible denial" and "to convince the intelligence committees of the United States Congress to authorize the plan" since "such purposes as provoking hostilities between Nicaragua and any of its neighbours, or the destabilization of the Nicaraguan Government through this programme were prohibited purposes" (p. 51, *supra*).

At the end of his testimony, he reiterated his view. I asked him: "*Q.*: Will you state again your overall conclusion as to the existence of arms traffic from Nicaragua to the Salvadoran insurgents?" he answered: "*A.*: I do not believe that such a traffic goes on now or has gone on for the past four years at least . . ." (P. 58, *supra*.)

It is a lawyer's cliché that it is "impossible to prove a negative". But Mr. MacMichael's testimony, I think, has done so in this case.

Mr. President, Members of the Court, may I conclude by reading from the Court's Judgment in the *United States Diplomatic and Consular Staff in Tehran* case, in which the United States was in the position that Nicaragua is in today. I will make minor adjustments to take account of the difference in the parties.

> "The essential facts of the present case are, for the most part, matters of public knowledge which have received extensive coverage in the world press and in radio and television broadcasts from (the United States) and other countries . . . Annexed or appended to the Memorial are numerous extracts of statements made by (Nicaragua) and United States officials either at press conferences or on radio or television . . . In addition, after the filing of the Memorial, and by leave of the Court, a large quantity of further documents

> of a similar kind to those already presented were submitted by (Nicaragua) for the purpose of bringing up to date the Court's information regarding the situation . . .
>
> The result is that the Court has available to it a massive body of information from various sources concerning the facts and circumstances of the present case, including numerous official statements of both (Nicaragua) and United States authorities . . . The information available, however, is wholly consistent and concordant as to the main facts and circumstances of the case."

"The main facts and circumstances" that emerge from the "consistent and concordant" body of evidence in this record is that the Government of the United States is guilty of conducting unlawful military and paramilitary activities in and against Nicaragua.

The Court rose at 1.00 p.m.

TWENTY-THIRD PUBLIC SITTING (19 IX 85, 10 a.m.)

Present : [See sitting of 12 IX 85, Judge Bedjaoui absent.]

QUESTIONS PUT BY JUDGE SCHWEBEL

The **PRESIDENT** : I have to announce that, for reasons disclosed to me by Judge Bedjaoui, he will be absent for both the morning and afternoon hearings. Before we proceed further, Judge Schwebel has a couple of questions to ask.

Judge **SCHWEBEL** : Mr. President, I wish to put some questions about what the actual position of the Government of Nicaragua is, as the evidence before the Court shows it, on the question of whether and, if so, to what extent it has or has not been assisting the insurgency in El Salvador. Possibly Professor Chayes may feel able to respond to my questions directly from his testimony, or the Agent may wish to respond when he speaks. In any event, it may be helpful to the Agent to know the problem I see so that he may endeavour to deal with it if he deems it appropriate.

For the reasons I spoke of at the outset of my questioning of Mr. MacMichael, with reference to Article 53 of the Statute, and for the reasons to which Professor Chayes referred in noting the difficulties faced by a State — and I may add, by the Court — when the other party to a case has absented itself, I am sure that the Agent and couunsel of Nicaragua appreciate the importance of clarifying this matter. I might add that I put these questions in pursuance of what I understand to be the intent of Article 53, as its drafters understood it to be. You may have seen the valuable book by our colleague Hugh Thirlway, on the rather contemporaneous subject of *Non-appearance before the International Court of Justice*. He notes that, while the Report of the Proceedings of the Advisory Committee of Jurists which drafted Article 53 is not extensive, the American member of that Committee, Elihu Root, was accompanied, in an advisory capacity, by James Brown Scott, Secretary of the Carnegie Endowment for International Peace, who wrote a report for the Board of Trustees of the Endowment, which has this to say about the intentions reflected in Article 53 :

> "The essential condition for the exercise of jurisdiction in such a case is and must be, that the plaintiff, although proceeding *ex parte*, should present its case as fully as if the defendant were present, and that the Court be especially mindful of the interests of the absent defendant. This does not mean that the Court shall take sides. It does mean, however, that the Court, without espousing the cause of the defendant, shall, nevertheless, act as its counsel. There is an apt French phrase to the effect that 'the absent are always wrong'. The Court must go on the assumption that the absent party is right, not wrong until the plaintiff has proven him to be wrong." (At p. 25.)

Now on the question of whether and to what extent the Nicaraguan Government is or has been rendering assistance to the insurgency in El Salvador, I find myself in a state of perplexity, not least because the evidence introduced by Nicaragua in my view is contradictory, or possibly contradictory. Let me review salient elements of the evidence as I understand it to be, and then put some questions.

First, there is the sworn affidavit of the Foreign Minister of Nicaragua, which, as Professor Chayes recalled yesterday, categorically stated:

> "In truth, my Government is not engaged, and has not been engaged, in the provision of arms or other supplies to either of the factions engaged in the civil war in El Salvador."

The Foreign Minister's affidavit goes on to acknowledge that there have been clandestine arms shipments from or through Nicaragua apparently destined for El Salvador, but maintained that "on numerous occasions" the security forces of his Government have intercepted such shipments. And he notes that it is difficult to prevent the use of Nicaraguan territory for such smuggling because of the remoteness of Nicaragua's border areas, which are mountainous and characterized by dense jungles.

The next item of interest is a report of an interview by a correspondent of the *New York Times* with President Daniel Ortega Saavedra, in which the President of Nicaragua, as reported in the *New York Times* of 18 July 1985, page 10, is stated to have conceded that Nicaraguan territory had once been used to ship weapons to guerrillas in El Salvador. He is further reported to have said that members of the Nicaraguan armed forces had aided such shipments but they had done so without Government sanction.

The next item of interest is also found in the *New York Times*, where, in the issue of 8 September 1985, Professor Chayes and Mr. Reichler are reported to have said:

> "that they would acknowledge that the Managua Government supplied weapons to Salvador Guerrillas for the big January 1981 offensive against the United States-backed Government in El Salvador. But they will argue that there is no credible evidence of sustained arms shipments since then."

That is one point in the story. Then, after some paragraphs on other matters, the story concludes with another pertinent point: "Mr. Reichler said that he 'strongly advised' Nicaragua that it should not undertake the court suit if it were still involved in arms traffic in El Salvador. 'They assured us from the beginning that they had nothing to hide.'" Now my understanding is that Professor Chayes rather generally and smilingly adverted to this story in his argument yesterday, if I understood him correctly.

Thereafter, on 13 September, Commander Carrión, as witness for Nicaragua, affirmed that:

> "My Government has never had a policy of sending arms to opposition forces in Central America. That does not mean that this did not happen, especially in the first years after the revolution in 1979 and 1980 . . . But this was never an official policy . . ." (P. 31, *supra*.)

Then on 14 September a story appeared in the *New York Times* which contains the following passages:

> "American lawyers for the Nicaraguan Government, whose suit now being heard in The Hague charges aggression by the United States because of its support for Nicaraguan rebels, have acknowledged that weapons were shipped to El Salvador before the January 1981 guerrilla offensive there but say there is no 'credible evidence' of a sustained flow since April 1981. They

> also say there is no proof that the Nicaraguan Government itself was responsible for the arms that were shipped in late 1980 and early 1981."

I might interpellate that, when I referred in my questioning of Mr. MacMichael to the statements attributed to Nicaraguan counsel in the *New York Times* story of 8 September, I had not yet seen the story which appeared on 14 September, which I have just now quoted.

On 16 September, Nicaragua presented Mr. MacMichael as a witness. Mr. MacMichael declared, on the basis of his study of the pertinent CIA files and his familiarity with the subject-matter, that he would "rule in" Nicaragua's having supplied arms to the insurgents in El Salvador in 1980 and 1981, particularly in connection with their big January 1981 offensive. He reiterated that conclusion unequivocally in a later point in his testimony, stating that it was his opinion that it could be taken as a fact that at least in 1980 early 1981 the Nicaraguan Government was involved in the supply of arms to the Salvadoran insurgency (pp. 59-65, *supra*).

On 17 September 1985, there appeared in the *New York Times* a story which contained the following passages:

> "In an interview with the *New York Times* earlier this year, President Daniel Ortega Saavedra of Nicaragua said, 'There were times when we were finding groups of 40 to 50 of our army soldiers ready with knapsacks and weapons on their way to El Salvador,' but, he said, 'we have had to detain them and to punish them.'
>
> Mr. Ortega said that at one point the first United States Ambassador to the Sandinista Government, Lawrence Pezzullo, presented him with evidence that an airstrip in the western province of Leon was being used to transport arms to Salvadoran rebels. He said, 'We took necessary measures so this airstrip would not continue to be used for this type of activities.'"

It is not altogether clear whether this story refers to the interview which President Ortega granted in July to a *New York Times* correspondent, or to another interview, but it appears to refer to the July interview, and contains quotations from it.

That, I believe, is the record as it stands, to which must be added the statements made in Court yesterday by Professor Chayes. In that latter regard, there is just one more item worth mentioning. Professor Chayes referred the Court to Nicaraguan Annex F, item 191, at page 292, as an accurate description of the involvement of a CIA official with *contra* operations. I might observe that the very story in the *Wall Street Journal*, which is item 191 of Annex F, states, in appraising the gains and losses of the *contra* programme: "It has also reduced the flow of arms into El Salvador". That is a statement introduced into evidence by Nicaragua.

Now on the basis of this record, I wish to ask the Agent and counsel of Nicaragua these questions, and I think it might be helpful if I read all of my questions and then if you wish to respond to any at this juncture I can restate them, and if you wish to put them all over to the comprehensive reply of the Agent, they can be dealt with at once; of course, I will give you a copy of this text.

My first question is this:

1. Does the Government of Nicaragua ask the Court to give full faith and credit to, or in any measure to disregard, Mr. MacMichael's testimony?

2. In particular, does it ask the Court to believe or disbelieve Mr. MacMichael's opinion that it could be taken as a fact that at least in 1980 early 1981 the Nicaraguan Government was involved in the supply of arms to the Salvador

insurgency? If the Court is asked to disbelieve this conclusion of Mr. MacMichael, why should it be asked to believe his other conclusions?

3. The story in the *New York Times* of 17 September contains direct quotations of an interview with President Ortega bearing on the immediate question at issue. Apparently a tape recording or transcript of the interview was made. May I ask Nicaragua to supply the Court with a copy of that transcript or tape recording?

4. May I ask if the Agent and counsel of Nicaragua find that the story of 14 September in the *New York Times* is an accurate report of their views, or at any rate of the views of Nicaragua's counsel, possibly in contrast to the story of 8 September? There are differences between the two, that is clear.

5. I observe that counsel are reported in the 14 September report in the *New York Times* not as saying that the Nicaraguan Government was not responsible for shipment of arms to El Salvador in 1980 and 1981, but that there is "no proof" that it was responsible. Is that an accurate report?

6. For this question I would like to return to the quotation of President Ortega's remarks, as recounted in the *New York Times*. Let me just recall it:

> "Mr. Ortega said that at one point, the first United States Ambassador to the Sandinista Government, Lawrence Pezzullo, presented him with evidence that an airstrip in the western province of Leon was being used to transport arms to Salvadoran rebels. He said, 'We took necessary measures so this airstrip would not continue to be used for this type of activities.'"

May I recall the exchange between Mr. MacMichael and me on this very point, the airstrip being named Papalonal.

> "*Q.* Have you heard of an airfield in Nicaragua at Papalonal, or an airstrip?
>
> *A.* Yes, I have.
>
> *Q.* Are you aware of the fact that the United States Government under the Carter Administration made representations to the Nicaraguan Government about the use of that airfield as a principal staging area for the airlift of arms to insurgents in El Salvador?
>
> *A.* Yes, I recall that very well."

And Mr. MacMichael continues:

> "I spoke earlier under direct questioning from Professor Chayes regarding information that had existed for that period — late 1980 to very early 1981 — and when I mentioned defectors I had in mind as a matter of fact some persons . . . who stated under interrogation following their departure from Nicaragua that they had assisted in the operations out of Papalonal in late 1980 and very early 1981, and as I say, I am aware of this; there was also an interception of an aircraft that had departed there — that had crashed or was unable to take off again from El Salvador where it landed — and I think that was in either very early January or late December 1980 and this was the type of evidence to which I referred, which disapppeared afterwards.
>
> *Q.* I understand you to be saying, Mr. MacMichael, that you believe that it could be taken as a fact that at least in late 1980 or early 1981 the Nicaraguan Government was involved in the supply of arms to the Salvadoran insurgency. Is that the conclusion I can draw from your remarks?
>
> *A.* I hate to have it appear that you are drawing this from me like a nail out of a block of wood but, yes, that is my opinion."

Now I have one last quotation, and I apologize for the length of this, which is quite critical to the last question I wish to put.

With precise reference to the same subject-matter of the Papalonal airstrip which Mr. MacMichael addressed in the exchange just quoted, the United States maintains:

> "The principal staging area came to be an airfield at Papalonal. The pattern and speed of construction at Papalonal, which is in an isolated area 23 nautical miles northwest of Managua, lacking adjacent commercial or economic activity, made clear its military function. In late July 1980, this airfield was an agricultural dirt airstrip approximately 800 metres long. By December, photography revealed a lengthened and graded runway with hard dispersal areas, and storage buildings under construction. By January 1981, the strip had been lengthened to 1,200 metres. A turnaround had been added at each end. A dispersal parking area with three hardstands had been constructed at the west end of the runway. Three parking aprons had been cleared, and three hangar or storage buildings, each about 125 metres wide, had been constructed on the aprons.
>
> On January 2, 1981, a C-47 was observed at Papalonal for the first time. Two C-47's were observed in February. These C-47's and DC-3's . . . were used to ferry larger cargos of arms from Papalonal to areas of guerrilla infiltration in southeastern El Salvador. Several pilots were identified in Nicaragua who regularly flew the route into El Salvador. Radar tracking also indicated flights from Papalonal to southeastern El Salvador.
>
> On January 24, 1981, a C-47 dropped arms by parachute in the vicinity of a small strip in southeastern El Salvador. On January 24, 1981, a Cessna from Nicaragua crashed upon takeoff after unloading passengers at an airfield in El Salvador close to where the C-47 airdrop occurred. A second plane, a Piper Aztec, sent to recover the downed crew, was strafed on the ground by the Salvadoran Air Force. The pilot and numerous weapons were captured. The pilot stated he was an employee of the Nicaraguan National Airlines (LANICA) and that the flight originated from Sandino International Airport in Managua." (Department of State, *"Revolution Beyond our Borders", Sandinista Intervention in Central America*, September 1985, pp. 18-19.)

The correspondence between these allegations and Mr. MacMichael's testimony is, in my view, significant.

The foregoing quotation is supported by the text of an intelligence summary written for the Carter White House on 9 January 1981, the day before the Salvadoran insurgents' "final offensive" was launched. I shall not take the time of the Court to read that text, but I believe that the Court will wish to read it. It is reprinted on pages 28 and 29 of the same publication, with a photograph of the airstrip.

7. Now my last questions, in the light of all this, for the Agent of Nicaragua are these: in view of the fact that the airstrip at Papalonal is not situated in the inaccessible border mountains or jungle of Nicaragua, but is a rather short distance from Managua; in view of the fact or allegation that, over a period of months preceding the January 1981 offensive of the Salvador insurgents, that airstrip was upgraded from an agricultural dirt airstrip of 800 metres to a lengthened and graded runway with hard dispersal areas, storage buildings, turnarounds, hardstands, parking aprons and three hangars, can the Court be asked to believe that, when the President of Nicaragua stated: "We took the necessary measures so this airstrip would not continue to be used for this type

of activities", it was not, or had not been, the official policy of the Government of Nicaragua to use this airstrip for precisely those activities, namely, the shipment of arms to Salvadoran guerrillas? Or, on the contrary, do the foregoing facts or allegations and President Ortega's statement indicate that the official policy of Nicaragua was precisely what Mr. MacMichael conceded it to be in 1980 and early 1981: to send arms to the insurgents in El Salvador? Finally, since the purpose of the insurgents in El Salvador clearly was to overthrow the Government of El Salvador, was not such a policy of Nicaragua, if it existed, directed towards the same end?

STATEMENT BY MR. ARGÜELLO GÓMEZ

AGENT FOR THE GOVERNMENT OF NICARAGUA

Mr. ARGÜELLO GOMEZ: Mr. President, Members of the Court, I think Judge Schwebel offered to give us the question.

The PRESIDENT: You will also have the verbatim records of this morning's hearings — the entire question as as it has been framed by Judge Schwebel, and because it is a long question, and there are several sub-questions, I suggest that if you so desire you could give a reply in writing later.

Mr. ARGÜELLO GOMEZ: Yes, Mr. President, that was my intention because we have to analyse what are the legal questions contained here in order to formulate a legal analysis. At this point, I wanted to give again our views on the meaning of Article 53. Judge Schwebel has expressed his opinion on the significance of that Article; also on the significance of some of the evidence. The position of Nicaragua and of any objective reasoning in this case is that it is of no relevance to discuss happenings five years ago when the evidence itself proves that in the past absolutely no question has been formulated as to the continuation of that situation; the development of that situation is, in the view of Article 53, what we are doing in this Court at this moment.

Without going into specifics of the questions, I think it is necessary to repeat what President Ortega has pointed out; what our Minister of Foreign Affairs has pointed out; what Commandant Carrion has pointed out; and, what Minister Huper has pointed out: that is, that it has not been the policy of the Nicaraguan Government to support insurgencies anywhere. The statements contained and read are very clear indicating the preoccupation of the Nicaraguan authorities when they were informed of certain happenings, and the action that was taken to suppress it immediately. Now with that statement, I will take advantage of your offer, Mr. President, and analyse the questions and probably in my Agent's speech tommorrow will answer them.

ARGUMENT OF PROFESSOR BROWNLIE

COUNSEL FOR THE GOVERNMENT OF NICARAGUA

Professor **BROWNLIE**: Mr. President, Members of the Court. May it please the Court. Mr. President, in following the speeches of Professor Chayes and Mr. Reichler, it is my task to seek to assist the Court in its appreciation of particular aspects of the evidence. I have sat listening to the factual account presented by my colleagues and I may say that that history is no less depressing than it was when I first became involved as counsel at the outset of this case early last year. Indeed, the revelations which followed the mining of Nicaragua's harbours, together with an increasingly bold public expression of the policy aims of the Respondent State, have introduced new elements of dictation and arrogance.

It is always a privilege to be involved with the practical business of settling disputes by peaceful means and to be given the role of counsel before this Court. On this occasion, it is a privilege also to work with an Agent who has faced great responsibility and pressures with fortitude and dignity and also to work with my American colleagues who represent the tradition of the Rule of Law in their country.

Such an occasion is normally also a pleasant one, but I regret to say that I do not find that my role on this occasion gives me any pleasure. I would prefer that the circumstances which gave rise to my presence here had never arisen.

The spectacle of a small State subjected in the most cynical way to coercion and physical attack by a superpower over a period of some four to five years is grim. Nicaragua has had no choice but to seek all available means to protect herself within the law. The Contadora process, the complaint to the Security Council, and the present proceedings, are all part of an effort to take all measures available.

From the period late in 1983 and early in 1984, when the pressure was being sharply increased, Nicaragua took her decision to initiate these proceedings. This period, it may be recalled, included the invasion of Grenada, a series of sabotage attacks, and the mining of Nicaragua's harbours. It goes without saying that the justiciability of these proceedings is not in question and probably never was, given the voting on admissibility in the first phase of the proceedings. And yet it is obvious that the scale of the case is unusual and that a case of this type presents the Court with a task quite unlike that in delimitation cases based upon special agreements.

No doubt the proceedings would have had a more convenient aspect if they had been restricted by the Applicant State to a complaint based exclusively upon either the breaches of the FCN Treaty, or the mining of harbours, or the attack on Corinto, or some combination of these sources of wrong-doing. But would such a course have been either realistic or morally acceptable? Mr. President, to expect such constraints in this case would be rather like advising a man with many serious wounds, and faced with threats of worse to come, to sue only for hurt to feelings or for only one of his wounds. Difficult though this case may be, it has a structure and reality dictated by its particular factual background, and by the nature of the evidence, which has a quality, a pattern and a coherence, which cannot be denied.

It is the nature of the evidence which is all-important, and this presents some technical issues of evaluation to which I shall now turn.

The Principles of Evidence in International Law

The precise issues of evaluating the evidence in this case must be prefaced by some observations about the role of the principles of evidence in international law. The Court will be relieved to hear that my purpose is not to produce a lecture on the law of evidence, but to point to certain questions of technique, policy and general approach, with the aim of providing assistance to the Court in its task.

It is sometimes said that "there are no rules of evidence in international law" (cp. O'Connell, *International Law*, 2nd ed., Vol. III, p. 1096), and it is normal for standard textbooks and works of reference, such as Whiteman's *Digest*, to ignore the subject of the law of evidence more or less completely. However, the proposition that there are no rules of evidence in international law is only true in the narrow sense that international law does not appear to give prominence to formal rules of exclusion — or admissibility — of evidence in the way in which common law systems do. And in any case the literature of public international law is not lacking in studies of the problems of evidence and proof, and such studies include works by two Members of the present Court. (Feller, *The Mexican Claims Commissions, 1923-1934*, New York, 1935, pp. 251-283; Witenberg, *Recueil des cours*, Vol. 56 (1936-II), pp. 5-102; Sandifer, *Evidence Before International Tribunals*, 1939, revised edition, Charlottesville, 1975; Rousseau, *Principes généraux de droit international public*, Vol. I, Paris, 1944, p. 912; Lalive, Jean-Flavien, *Annuaire Suisse*, Vol. 7 (1950), pp. 77-103; Fitzmaurice, *British Year Book*, Vol. 29 (1952), pp. 57-60; Cheng, *General Principles of Law*, London, 1953, pp. 302-335; Evensen, *Nordisk Tidsskrift*, Vol. 25 (1955), pp. 44-59; Simpson and Fox, *International Arbitration*, London, 1959, pp. 192-213; Rosenne, *The Law and Practice of the International Court of Justice*, 1965, Vol. II, pp. 580-584; Lachs, contribution to the volume *La preuve en droit* (ed. Perelman and Foriers), Travaux du Centre national de recherches de logique, Brussels, 1981, pp. 109-122.)

For present purposes it is necessary to draw attention to the key principles which govern the admissibility and evaluation of evidence in this Court. The first such principle is that it is the Court which has the preponderant role in assessing evidence, and in seeking to establish the objective truth (see Evensen, *op. cit.*, pp. 44-46; Lachs, *op. cit.*, pp. 113-114). However, this principle is of considerable generality and its significance probably lies in the negative indication it gives that the Rules of Court are not based upon the "adversarial procedure" of the common law. The second key principle consists of the complete freedom of action and of appreciation which international tribunals, including this Court, enjoy in respect of matters of evidence (see Evensen, *op. cit.*, pp. 45-46; Lachs, *op. cit.*, p. 111). This principle calls, in my estimation, for careful commentary. It is apparently intended to express the idea that the Court is not bound by a set of rules of admissibility (or exclusion) of the type met with in systems of common law, and thus the Court is primarily concerned with the relevance and weight of evidence and tends to leave aside the issue of admissibility (or exclusion) as such (see Rosenne, *op. cit.*, p. 584). All this is no doubt true, but in terms of practical application the principle of judicial freedom in the matter of evidence is heavily qualified by the necessity, which the judicial function forces upon the Court, of selecting reliable evidence and discriminating against weak evidence, either by open rejection or as a consequence of giving very little weight to evidence not actually rejected.

This qualification of the principle of judicial freedom can be expressed in the form of the third of the key principles which, in my submission, govern the evaluation of evidence before international tribunals. The third principle is, quite simply, to the effect that ordinary principles of logic and good sense must govern the evaluation of evidence since, if the Court is to satisfy itself that "the claim is well-founded in fact and in law", as required by the terms of Article 53 of the Statute, some criteria of logical discrimination and the weighing of evidence must be found. It is only by means of such criteria that the Court can, acting judicially, establish the truth of the facts relevant to its decision with reasonable certainty.

Subject to a certain proviso to be made in due course concerning the standard of proof in the context of Article 53 of the Statute, the Applicant State has taken, and will continue to take, care to assist the Court as far as possible in evidential matters. In this respect the Applicant has placed express reliance upon the pertinent logical categories in presenting evidence and has sought to present the best evidence available.

EXPRESS ADMISSIONS BY RESPONSIBLE OFFICIALS

Mr. President, having concluded my brief general remarks on the rules of evidence, I can now turn to specific aspects of the evidence. The documentary evidence submitted by the Applicant consists to a considerable extent of the express admissions on the part of senior United States officials on the public record. The record also includes evidence of the Administration's approaches to Congress for the funding of military and paramilitary operations in Nicaragua and the resulting committee deliberations and legislation. The Respondent State's policies of coercion have long been matters of public knowledge and that is itself a form of evidence, as appears from the Judgment in the case concerning *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* (*I.C.J. Reports 1980*, p. 9, para. 11). However, two characteristics of the public record are of particular importance evidentially speaking. The first is the probative value of admissions against interest by leading United States officials, and the second is the evidence of a system or consistent pattern of intentions, purposes and acts. These characteristics are important and deserve some emphasis.

In the case of express admissions the probative value derives from the fact that the party makes a declaration adverse to its case. The evidential significance of admissions is increased in the case of a State party when the admission is made by a senior official and the subject-matter lies within his or her personal knowledge and professional competence. An additional criterion of probative value is the expression of official policies and intentions at the highest level of government, and I would refer in this context to the view of the Chamber of the Court in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* (*I.C.J. Reports 1984*, pp. 307-308, para. 139). The admissions against interest invoked by the Applicant State in the present proceedings involve the President of the United States, together with other leading officials, such as those occupying the office of Secretary of State, and that of Vice President.

In the precise circumstances of the case there are further elements which considerably enhance the evidential significance of the admissions made by senior officials. The first particular element of enhancement lies in the fact that since 9 April 1984, that is of course the date of the Application, the issue of legal responsibility has been in the open for all to see, it has been *sur le tapis*. This new phase in the history of relations between the United States and Nicaragua was also heralded by the furore in Congress concerning the revelations of the mining of Nicaragua's harbours (see Memorial, Ann. E, Attachments 9, 10 and

11), the resignation of Senator Moynihan as Vice Chairman of the Senate Select Committee on Intelligence (statement of 15 April 1984, Attachment 11), and the receipt of diplomatic protests from a number of States where ships had been damaged by mines (Memorial, IV, p. 125, para. 481).

In simple terms, Mr. President, with effect from 9 April 1984, the admissions were *post litem motam* and the senior officials concerned could not be heard to say that they did not understand the implications of what they were putting on the record.

The second particular element of enhancement consists of the description over a long period of the actions taken against Nicaragua as "covert actions" as, for example, in the response by the President in his news conference on 19 October 1983 (Memorial, Ann. C, I, 2). In my submission such terminology of covert actions strongly suggests that the activity concerned is not reconcilable with legality.

The third element of enhancement is the fact that a number of statements by senior officials show a consciousness at a certain stage that there are specific issues of legal responsibility which arise from the actions directed against Nicaragua. Two examples will suffice. The first is the speech by Ambassador Kirkpatrick at the conference of the American Society of International Law on 12 April 1984 (Memorial, Ann. C, II, 4). The second is the Counter-Memorial submitted by the United States in the Jurisdiction and Admissibility phase of the present case. Both these items show a clear consciousness of the issue of State responsibility raised by Nicaragua's Application.

I conclude my remarks on the subject of admissions by respectfully reminding the Court that such submissions may have different types of relevance.

First, express admissions provide cogent evidence of United States control over mercenaries carrying out operations in and against Nicaragua.

Second, admissions constitute direct evidence of intention and purpose in relation to United States assistance to and control over forces operating against Nicaragua.

Third, admissions form evidence of the responsibility which the United States bears for the military and paramilitary operations against Nicaragua.

A System or Consistent Pattern of Intentions and Activity

The first characteristic of the public record in this case is thus the incidence, prominence and probative value of express admissions by the leading officials of the United States Government. Matching with this is the second characteristic of the public record, the existence of a system or consistent pattern of intentions and activity visible in the mass of evidence submitted. The consistency of the pattern justifies the inference, the logical conclusion, that the events form part of a coherent and deliberate policy, resulting from decision, planning, specified goals, programme implementation and pre-arranged funding, on the part of the United States Government.

Evidential Significance of the Reference to Collective Self-Defence by the United States in the Previous Proceedings

The express admissions against interest which are a primary feature of the evidence in this case are complemented by the invocations of the legal category of collective self-defence by the United States in the course of the previous proceedings and, in particular, in the Counter-Memorial submitted on the

Questions of Jurisdiction and Admissibility (see paras. 6, 202 and 515-519). The details are to be found in Nicaragua's Memorial in the present phase (paras. 191-204), and need not be repeated here.

The present purpose is to point to the way in which one form of evidence is complemented, corroborated and reinforced by another form of evidence. The deliberate invocation of collective self-defence, belated and episodic though this has turned out to be, involved an acceptance of legal responsibility by the United States in respect of the military and paramilitary operations in and against Nicaragua, and this acceptance is a matter of public record and has been expressed in the face of the Court in the incidental proceedings relating to this case. It is clear that the use of the justification of collective self-defence constitutes a major admission of direct and substantial United States involvement in the military and paramilitary operations directed against the Applicant State. The references to collective self-defence imply direct participation in and control of the armed forces involved, rather than indirect assistance in its various forms.

The point of this argument on behalf of Nicaragua stands in need of a certain clarification. Nicaragua disputes that the justification advanced by the United States is applicable on the facts. However, since the United States has decided not to support its assertion by any evidence in these proceedings, the voluntary plea of collective self-defence necessarily connotes a prima facie legal responsibility subject to the validation of the defence by the adduction of sufficient evidence. No evidence is offered by the Respondent State in this Court, and there is a substantial weight of evidence to contradict the hypothesis of collective self-defence.

In particular, the publicly expressed purpose of United States coercion — the overthrow of the lawful Government of Nicaragua — is essentially incompatible with any concept of collective self-defence in a legal form, and the tactics employed, such as the use of terrorism against civilians, are also incompatible with that concept.

ACCEPTANCE OR RECOGNITION OF RESPONSIBILITY BY THE UNITED STATES

Thus far, Mr. President, my argument has relied upon the express admissions of United States officials in two forms.

First, in the form that express admissions against the interest of the party making them constitute a significant part of the evidence supporting the complaints presented in the Application, but are not in themselves conclusive of the issues of responsibility and liability.

Second, in the form that the invocation of the plea of collective self-defence in the incidental proceedings related to the case constitutes a form of estoppel or preclusion, to the effect that the United States bears a prima facie legal responsibility for the military activities in and against Nicaragua, subject only to the validation of the hypothesis of collective self-defence by the introduction of sufficient evidence.

The second form of reliance goes some way, but still not the whole way, to the view that the admissions on the public record, whether in proceedings before the Court or elsewhere, are conclusive on the question which in English is termed "liability", that is to say, the issue of legal responsibility *tout court*.

In the next phase of my presentation the purpose will be precisely to take the argument the whole way, and thus to assert and justify the proposition that the express declarations of responsible United States officials involve an acceptance or recognition of legal responsibility which, in the circumstances, constitutes an independent basis of legal responsibility, which operates autonomously alongside the causes of action invoked by Nicaragua in the Application and in the Memorial concerning the Merits of the case.

At the risk of stating what is perhaps obvious, I would point out that the three forms of reliance on the express declarations of officials are not interdependent and, therefore, a failure to convince the Court on the more ambitious argument should not, in my submission, prejudice the Court's view of the other two forms of reliance upon express declarations.

Some examples

Before I develop the legal arguments it will be helpful if I give some examples of express declarations which, in any reasonable construction, involve an acceptance or recognition of legal responsibility for a particular course of conduct.

The following five examples provide a sufficient sample of the express declarations of the type in question made by President Reagan.

The first example concerns the attack on the oil storage tanks at Corinto. At his news conference on 19 October 1983 President Reagan is asked a direct question relating to the attack on Corinto which had occurred on 10 October. He was asked whether it was "proper for the CIA to be involved in planning such attacks and supplying equipment for air raids?". The questioner then continued: "and do the American people have a right to be informed about any CIA role?" (Memorial, Ann. C, I, 2).

The President's response was to assert the rightness of the use of covert activity when a country "believes that its interests are best served". There is no denial of involvement, only a refusal to discuss specific cases. Moreover, there is a highly significant reference to "some of the specific operations down there". This was in response to a question which linked the CIA to a specific subject-matter involving the use of force against another State. The reaction is one of essential approval. There is no reference to any legal justification even in general terms. There is no denial of the CIA connection. Above all, the question evokes no surprise, no alarm. President Reagan is clearly possessed of prior knowledge of what he describes as "the specific operations down there".

The next example in my submission is no less impressive. At a White House press conference on 5 May 1983, earlier in the same year, the background to the whole series of declarations was established. The material part of the exchange was as follows:

> "*Q.* Mr. President, can I follow up on something you said earlier? Did I understand you to say that if you were forced to stop aid to the Nicaraguan guerrillas, that you would try to funnel through other countries?
>
> *The President:* No, I was saying that's what the Committee said, that the Committee said we would have to go overt, and then, in going overt, you can only give money to another government. And, if you did that, then you would have to be depending on — well, maybe those other governments in Central America would give that money to the freedom fighters in Nicaragua.
>
> Now, if they want to tell us that we can give money and do the same thing we've been doing — money, giving, providing subsistence and so forth to these people directly and making it overt instead of covert — that's all right with me. I just don't want the restrictions put on it that they might put on.
>
> *Q.* You'd be willing to accept the idea of overt aid to the anti-Sandinista guerrillas in Nicaragua?

> *The President*: Yes, but not if they do it as one individual or more than one, as suggested on the Hill — that they would do it and, then, we would have to enforce restrictions on the freedom fighters as to what tactics they could use.
>
> And I have said that if we were to do that, then I would expect that the only fair thing would be that the Nicaraguan Government would itself impose the same restrictions on the freedom fighters in El Salvador, only I don't call them freedom fighters because they've got freedom and they're fighting for something else. They're fighting for a restraint on freedom.
>
> *Q*: Can I just — All of a sudden now we're aiding freedom fighters. I thought we were just interdicting supplies into . . ." (Memorial, Ann. C, I, 1.)

In his response to this last question the President explained his conception of "freedom fighters".

Mr. President, although it may be a little tiresome and difficult to follow I have produced the entire sequence of questions and answers from the White House transcript.

As Nicaragua has pointed out in its Memorial, the various exchanges between the President and the press on 5 May 1983 involve a series of admissions that the United States was systematically giving aid to mercenaries carrying out operations against the Government of Nicaragua. The element of debate in the exchange is limited to the modalities of such aid. The facts of it happening and its purpose are fully accepted. Moreover, the President accepts that the United States has the means to "enforce restrictions" on the policies and tactics of the guerrillas. And yet "restrictions" can only be "enforced" if the situation is characterized by elements of direction and control.

I move on to the third example which is provided by the interview with the *New York Times* given in the White House on 28 March 1984. President Reagan recognized there, in the clearest possible language, that the United States was assisting the *contras* who were, in the phrasing of the question to which the President was responding, "seeking to overthrow a government that we have diplomatic relations with". The President's reply makes no attempt to deny the facts, either the fact of giving assistance to the guerrillas or the fact of having the purpose of overthrowing the Government of Nicaragua. His reply includes the following passage:

> "And I see no dichotomy in our supporting the governmment, the democratic government of El Salvador, and the *contras* here — and we've made it plain to Nicaragua — made it very plain, that this will stop when they keep their promise and restore a democratic rule. And have elections. Now, they've finally been pressured, the pressure's led to them saying they'll have an election. I think they've scheduled it for next November . . ." (Memorial, Ann. C, I, 4.)

The fourth example of such declarations consists of the now famous "say Uncle" statement in a press conference at the White House on 21 February 1985. The full exchange of question and answer needs to be followed through in order to obtain a proper appreciation of the President's thinking. The exchange proceeds as follows:

> "*Q*: Mr. President, on Capitol Hill — on Capitol Hill the other day, Secretary Shultz suggested that a goal of your policy now is to remove the Sandinista government in Nicaragua. Is that your goal?
>
> *The President*: Well, remove in the sense of its present structure, in which it is a communist totalitarian State, and it is not a government chosen by

> the people. So, you wonder sometimes about those who make such claims as to its legitimacy. We believe, just as I said Saturday morning, that we have an obligation to be of help where we can to freedom fighters and lovers of freedom and democracy, from Afghanistan to Nicaragua and wherever there are people of that kind who are striving for that freedom.
>
> And we're going to try to persuade the Congress that we can legitimately go forward and hopefully, go forward on a multi-party basis with the Scoop Jackson plan for trying to bring development and help to all of Central America.
>
> *Q.* Well, Sir, when you say remove it in the sense of its present structure, aren't you saying that you advocate the overthrow of the present government of Nicaragua?
>
> *The President.* Well, what I'm saying is that this present government was an element of the revolution against Somoza. The freedom fighters are other elements of that revolution. And once victory was attained, the Sandinistas did what Castro had done, prior to their time, in Cuba. They ousted and managed to rid themselves of the other elements of the revolution and violated their own promise to the Organization of American States, and as a result of which they had received support from the Organization, that they were — their revolutionary goal was for democracy, free press, free speech, free labor unions, and elections, and so forth, and they have violated that.
>
> And the people that are fighting them, the freedom fighters opposing them, are Nicaraguan people who want the goals of the revolution restored. And we're going to try to help.
>
> *Q.* Is the answer yes, Sir? Is the answer yes, then?
>
> *The President.* To what?
>
> *Q.* To the question, aren't you advocating the overthrow of the present government? If ...
>
> *The President.* Not if the present ...
>
> *Q.* ... you substitute another form of what you say was the revolution?
>
> *The President.* Not if the present government would turn around and say, all right, if they'd say, 'Uncle'. All right, come on back into the revolutionary government and let's straighten this out and institute the goals." (Memorial, Ann. C, I, 14.)

As the Court has heard before, Mr. President, saying "Uncle" is a colloquial expression indicating willingness to submit, the equivalent of saying "pax" in some other cultural contexts. The entire exchange can be summarized in the form of two propositions: first, that the goal of United States policy is to remove the lawful Government of Nicaragua; and second, that this policy is to be enforced by any coercive means available to the present Administration.

Later in the same press conference the President affirmed the position and also asserted, though in very general terms, that what his Administration was doing was within the United Nations and Organization of American State Charters. However, no actual justification was given, and the senior official of the United States must be presumed to know that there is no right to overthrow the government of another State on political grounds.

The fifth and last example of an express declaration is provided by the White House press conference on 4 April of this year. On this occasion, with a considerable fanfare, President Reagan presented what he termed "a peace proposal" which, in itself, constitutes an admission both of United States-controlled *contras* and the purpose behind the operations of the *contras*. He said:

> "I'm calling upon both sides to lay down their arms and accept the offer of church-mediated talks on internationally supervised elections and an end to the repression now in place against the Church, the press and individual rights.
>
> To members of the Democratic Resistance, I ask them to extend their offer of a cease-fire until June 1st.
>
> To the Congress, I ask for immediate release of the $14 million already appropriated. While the cease-fire offer is on the table, I pledge these funds will not be used for arms or munitions. The funds will be used for food, clothing, medicine and other support for survival. The Democratic opposition cannot be a partner in negotiations without these basic necessities.
>
> If the Sandinistas accept this peace offer, I will keep my funding restriction in effect. But peace negotiations must not become a cover for deception and delay. If there is no agreement after 60 days of negotiations, I will lift these restrictions, unless both sides ask me not to." (Memorial, Ann. C, I, 19.)

Mr. President, the so-called "peace proposal" is thus what a lawyer would call a conditional offer, in effect, an ultimatum: agree to fundamental changes in the Government of Nicaragua within 60 days or face a renewed onslaught from the *contras*. The peace proposal emphasizes that the activities of the United States, in conjunction with the *contras*, form a single coherent political instrument intended to achieve a set of policy objectives decided upon in Washington.

There are many statements by Administration officials, especially in the period since January of this year, which affirm the goals of United States policy, and the chosen method of implementation in relation to Nicaragua. The documentation is available to the Court. The record includes a statement by Secretary of State Shultz on 19 February, testifying before the House of Representatives Foreign Affairs Committee (Memorial, **IV**, p. 34), the public address by President Reagan on 1 March (Memorial, Ann. C, I, 15, **IV**, p. 185), the radio address by the President on 8 June 1985, which is in the supplemental evidence given to the Court when these proceedings were about to begin, and many others.

And the public record includes documents revealing the role of Congress and its committees in relation to the Administration policy of supporting the *contras*.

This large family of express declarations, together with the legislation which has been submitted to Congress, and the legislation actually adopted by Congress, constitutes an acceptance or recognition of legal responsibility on the part of the United States in respect of the military and paramilitary operations referred to in the Application and the Memorial on the merits.

That, Mr. President, is my submission, and it remains to me to present the argument which provides the legal foundation for that submission.

Acceptance and Recognition: The Legal Argument

In the *Corfu Channel, Merits, Judgment*, the Court gave considerable attention to what it called the "attitude" of Albania in the context of deciding whether Albania had knowledge of the mining (*I.C.J. Reports 1949*, pp. 18-20). The Court had no difficulty in establishing what that attitude was by examining the relevant facts. The logic is clear: depending on the legal context, legal consequences will flow from the attitude of a government when evidence can establish the intention or attitude with reasonable certainty. If the attitude of a government, as evidenced by the persistent public pronouncements of responsible officials, amounts to positive approval of an illegal course of action, then the logical consequences must be responsibility for that course of action, and similar reasoning is to be found in the Judgment of the Court in the *United States Diplomatic and Consular Staff in Tehran* case (*I.C.J. Reports 1980*, pp. 33-35, paras. 69-75).

The proposition that acceptance or recognition of responsibility may constitute an autonomous basis of State responsibility has deep and healthy roots in ordinary legal logic, in general principles of law, and in familiar concepts of general international law.

Those deep and healthy roots include the following legal institutions and principles.

The primary principles are, quite simply, those of sovereignty and consent. If a sovereign State commits itself unequivocally to a particular expression of will, then, according to the ordinary principles of logic, an international tribunal has the power to give an appropriate effect to that expression of will. The legal validity of treaties and the principle *pacta sunt servanda* are the important examples of the effects of sovereignty and consent, but they are not the only examples.

It has long been accepted that a State may create obligations for itself by means of unilateral declarations; the record will contain references to the views of Lord McNair, *Law of Treaties*, Oxford, 1961, page 11; Rousseau, *Droit international public*, I, Paris, 1971, pages 416-432; Suy, *Les actes juridiques unilatéraux*, Paris, 1962; Judge Lachs, *Syracuse Journal of International Law and Commerce*, Volume 10 (1983), page 239 at pages 266-270; Paul De Visscher, *Essays in International Law in Honour of Judge Manfred Lachs*, The Hague, 1984, pages 459-465 (and see, in particular, the conclusion at p. 465). That unilateral declarations can have substantial legal consequences is evidenced by the Judgments of the Court itself in the *Nuclear Test* cases (*I.C.J. Reports 1974*, p. 253 at pp. 267-268, paras. 42-46).

Mr. President, the Court is no doubt well aware that there is no precedent in the decisions of international tribunals for applying the concept of unilateral declarations to a case such as the present. But, for the lawyer, logic can only apply within a particular context and the present case involves the context of State responsibility just as the *Nuclear Test* cases involved the context of admissibility. The destination in each case may be different although the juridical vehicle remains the same. It is for a tribunal to put legal logic to work in accordance with its judicial discretion and the special circumstances of the case before it.

However, the concept of unilateral declarations is not the only relevant legal institution. There are several others. Thus the significance of admissions in the law is well accepted both in international jurisprudence and in the doctrine. The evidential significance of admissions has been pointed to by Fitzmaurice (*British Year Book*, Vol. 30 (1953), pp. 44-47); Cheng (*General Principles of Law*, London, 1953, pp. 141-147); and Martin (*L'estoppel en droit international public*, Paris, 1979, pp. 194-204); (and see also the Memorial of Israel, *Aerial Incident* case, *I.C.J. Pleadings*, pp. 99-100, paras. 89-90). Whilst it is clear that admissions have a contributory and partial effect and are not, evidentially speaking, conclusive, the fact remains that the logic behind the legal force of admissions is identical with the logic behind the legal force of unilateral declarations.

The congenor of unilateral declarations and admissions is the legal concept of recognition. This is normally applied in the context of recognition of States and governments. But it is not so confined either by logic or in actual practice, and thus it may apply to a variety of rights and legal situations. This wide application is generally accepted in the literature: I refer again to the treatise of Rousseau (*Droit international public*, I, Paris, 1971, p. 426, para. 344); Venturini (*Recueil des cours*, Vol. 112 (1964-II), pp. 416-419 (with useful citations)); Charles De Visscher (*Les effectivités en droit international public*, Paris, 1967, pp. 23-24, 101-111); Suy (*Les actes juridiques unilatéraux en droit international public*, Paris, 1962, pp. 189-214 (see, in particular, at pp. 202-206)). Whilst examples will be in practice exceptional, there is no logical objection to the application of the principle of recognition to the acceptance of legal responsibility for particular courses of conduct: and such acceptance is after all only another case of the recognition of a legal situation. Recognition in this context can be seen to be the natural extension, the more mature version, of the admission against interest.

Unilateral declarations, admissions, and the recognition of legal situations, form the international law branch of a family of legal principles which is well represented in municipal legal systems. The analogues within municipal law include the institution of the waiver of claims, which is the logical complement of the acceptance of liability. In the system based upon the common law there are two further analogues — that is, apart from admissions and confessions of liability. One such analogue is the acknowledgement of a debt which would otherwise be barred by the Limitation Act which excludes the contractual remedy after a certain time has elapsed: see, for example, *Anson's Law of Contract*, 26th edition by Guest, Oxford, 1984, page 524. Another such analogue in the sphere of public law this time is the principle that the Crown is bound by the law of estoppel by representation: see Hogg, *Liability of the Crown in Australia, New Zealand and the United Kingdom*, Melbourne, 1971, pages 146-147.

Mr. President, I know that counsel should not take it on himself to instruct this Court on matters of law but, as it is often said at the Bar, it is occasionally difficult to find authority for fundamental propositions which when stated seem obvious. Hence my essay in legal principles. With your permission, I shall now move from doctrine to practice in the form of the Memorials of Israel and the United States in the *Aerial Incident* case: *I.C.J. Pleadings, Aerial Incident of 27 July 1955*.

The Court adjourned from 11.20 to 11.40 a.m.

Mr. President, before the break I had looked at the various matters of principle relating to the concept of the acceptance and recognition of State responsibility as a result of express declarations made by senior officials and I had come to the point where I was going to move from doctrine to practice and there was some practice in the rather interesting form of the Memorials of Israel and the United States in the *Aerial Incident* case (*I.C.J. Pleadings, Aerial Incident of 27 July 1955*).

In those proceedings the Memorial of Israel, in which no doubt Shabtai Rosenne had a hand, places careful and — in my submission — justified reliance upon the principle that admissions of responsibility by a respondent State may have "a peremptory and final character" (*ibid.*, p. 99, para. 89). The passages in that Memorial which affirm the principle are a follows:

> "89. Regarding the peremptory and final character of the admissions concerning the state of mind and behaviour of the units of the Bulgarian armed forces, contained in the Bulgarian Notes Verbales of July and August 1955, it is submitted that the position is clear. International law has long recognized the conclusiveness of admissions of this character. The general principle was clearly stated as far back as 1856 in the well-known arbitration in the *Croft* case between Great Britain and Portugal . . .

> > 'If what was contained in the statement of the 17th November, 1851, had been expressed in a note or other diplomatic communication, addressed to the British Government by the Portuguese Government as its view of the case, it might then have been justly said that the one Government had thereby of itself made an acknowledgement and an admission to the other by which the latter was now altogether exonerated from the task of proving that the case really stood as it was represented there' (*British and Foreign State Papers*, Vol. 50, 1288 at p. 1291.)
>
> This principle, which is consonant with the general principle of good faith as one of the bases of orderly international intercourse, is now firmly established in international law, and has been applied on many occasions by international tribunals. For decisions of the International Court of Justice in which it was applied, reference may be made to the views of the Court regarding declarations made by the Albanian Delegate in the Security Council in the *Corfu Channel* case (Merits), *I.C.J. Reports 1949*, at page 19; to the Court's attitude regarding various official memoranda by the Union of South Africa in the *Statute of South West Africa* case, *I.C.J. Reports 1950*, at pages 134-136; and to the Court's attitude towards certain admissions made by France to the United Kingdom in diplomatic correspondence during the 19th century, in the *Minquiers and Ecrehos* case, *I.C.J. Reports 1953*, at p. 71.
>
> 90. The Government of Israel wishes to stress this point in the light of the tendency which has appeared in the later stages of the diplomatic discussions, and particularly in the meeting of 13 September 1957 ... for the Bulgarian Government to argue that the Note Verbale of 4 August 1955 (Ann. 17) did not constitute acceptance by it of responsibility, any contrary interpretation being erroneous. In the view of the Government of Israel, in this respect the Note Verbale is clear enough and does not call for any sophisticated 'interpretation'. Acceptance of such a view as the Bulgarian officials have been putting forward would imply that a government would be entitled to blow hot and cold at the same time: for purely political purposes to make statements which, for their impact upon the rights of others, would be of possibly far-reaching implications ... and then to be free of all legal consequences when those whose rights are affected seek to implement those very rights apparently once recognized."

In the same case the Memorial of the United States (*ibid.*, p. 207) includes a section with the heading "Admissions by the Bulgarian Government to Other Governments", and the first paragraph of this section then reads:

> "The United States Government believes it appropriate to offer as evidence the various communications on the subject of the Bulgarian Government's liability for the killing of passengers of the 4X-AKC aircraft near Petrich on 27 July 1955, made by the Bulgarian Government to other governments whose nationals were on board the airliner and were similarly killed."

This view of the law is confirmed by the third of the "Submissions" with which the United States Memorial concludes (at p. 252). Moreover, that Memorial, in another passage, states:

> "There had been a firm, solemn admission of international liability to the United States Government. The same announced assumption of responsibility was made to all governments concerned, and to the press and public ..." (*Ibid.*, p. 187, para. 14; and see also at p. 175.)

In sum, Mr. President, this episode in the pleadings before the Court in the *Aerial Incident* case points up the fact that governments have been quick to recognize the principle of acceptance or recognition of liability when the factual material makes a focus upon this principle entirely natural and inevitable.

Application of the Principle of Acceptance

The legal argument on the principle of acceptance of responsibility is concluded and it is now necessary to relate the principle to the circumstances of the present case. The facts surrounding the express declarations of responsible United States officials and the terms of those declarations themselves, may be analysed in terms of the following discrete but related elements.

First, the issue of State responsibility has been public and overt at least since the filing of the Application on 9 April 1984, and the existence of the issue was underlined by the proceedings before the Court relating to interim measures of protection, and also to jurisdiction and admissibility.

Second, in the successive statements made by President Reagan and other senior officials, the purpose of the United States Government is evoked with appalling clarity; and that purpose is to use all necessary or convenient measures of coercion to overthrow the lawful Government of Nicaragua and to replace that Government with one acceptable to the United States.

Third, with certain incongruous and untimely exceptions, no legal justification for the policies of the Administration is offered.

Fourth, in so far as officials have on occasion invoked the concept of collective self-defence, that is on its face inapplicable, since *ex hypothesi* the overthrow of a lawful government cannot be a form of self-defence, collective or otherwise, in any circumstances.

Fifth, and finally, the implication of the various declarations by responsible officials is that responsibility is accepted; it must be presumed that such officials fully appreciate the consequences of their actions or, at the very least, take the risk of those consequences.

This last proposition may be supported by some additional considerations.

In the first place, the declarations form part of a consistent pattern of evidence which confirms the general nature of the attitude and intentions of the Government of the United States concerning Nicaragua.

Second, the fact that the mode of implementing the policy of the Respondent State originally involved "covert action" further justifies the implication that declarations of hostile intention and involvement connote admissions of legal liability, since what is covert is presumed to be impossible to justify in legal terms. In this connection, I would refer the Court to the evidence of Mr. MacMichael on Monday of this week, when he linked covert operations with a policy of "plausible denial" (the phrase he used), as a policy adopted in United States Government practice.

Third, a Government which persistently and publicly declares that it is using, and will continue to use, illegal means to overthrow the lawful government of another State cannot have the benefit of the presumption of innocence or regularity.

Mr. President, I can now leave the general issue of express declarations and the acceptance of responsibility by the United States, and move on to certain forms of evidence which confirm and corroborate the record of acceptance or recognition of responsibility.

Confirmatory or Corroborative Material

The first form of confirmatory evidence consists in the incongruous and substantially inconsistent assertion that United States policies have been justified as a form of collective self-defence. The subject has been fully canvassed in the Memorial (paras. 191-204, 285-291). My purpose now is to underline the episodic and inconsistent character of the reference to collective self-defence by the United States. Prior to the Application presented by Nicaragua in April of last year, the military and paramilitary operations against Nicaragua had been described as covert and, so far as they were reported to the relevant Congressional Committees, they were alleged to involve tactics of interdiction only. The operations actually being undertaken were not justified, firstly, because they were not admitted to exist prior to May 1983, and secondly, because it would have been difficult to provide a credible justification which would, so to speak, stand up in Court. Moreover, when the reality broke the surface of things, as in the attack on Corinto in October 1983, no reference was made by any official to the question of legal justification.

From April 1984 until January of this year, sporadic reference was then made to the concept of collective self-defence, and this belated use of a legal justification goes to emphasize the absence of any serious and consistent attempt to provide a legal justification for the operations before that period. In any case, the mining operation was by definition indiscriminate and literally impossible to fit into a legal concept of self-defence. The same can be said of the terrorist attacks directed against the civilian population within Nicaragua.

However, since the President's press conference on 21 February of this year (Memorial, Ann. C, I, 14), the belated references to a legal justification have ceased. The flirtation with legality, never a serious affair, was now over. In any case, the declarations of responsible officials before the period of flirtation involved an acceptance of liabilty which, together with the other evidence, destroyed the very foundations of the assertion of collective self-defence. The express declarations since February of this year simply confirm that this claim had always lacked substance.

PARTICULAR EPISODES CONSTITUTING CONFIRMATORY EVIDENCE

The Attack on Corinto

The nature, purpose and illegality of United States policy is evidenced in the most concrete form by the attitude of officials in face of particular episodes involving hostile operations against Nicaragua. One such episode was the attack on Corinto on 10 October 1983. This was an attack launched not by mercenary forces, but by personnel forming part of United States units. A speedboat was used armed with machine guns and a cannon. The attack was dramatic and very destructive. More than 100 persons were injured (see Memorial, para. 87). The attack received substantial publicity.

At the press conference on 19 October, a little more than a week later, President Reagan was asked a direct question about CIA involvement in the Corinto affair (Memorial, Ann. C, I, 2). Mr. Reagan's response is hardly that of a Head of State or foreign minister faced with a false and provocative accusation. Not at all. Mr. Reagan was neither shocked nor surprised. No denial is made; and no legal justification is offered. True, he is not willing to discuss details, but the clear implication is that "the specific operations down there" did include the attack on Corinto. The President expressly refers to the responsibilities of a government, and the context is that of a reply to a question which referred directly to the CIA.

As a consequence of the attack, the Deputy Foreign Minister of Nicaragua protested to the United States Ambassador (Ann. F, p. 92), and a protest note was sent to Washington. No denial of United States involvement, either formal or informal, is reported to have been made at any stage, either in Managua or in Washington. Indeed, in the aftermath of the attack, the *New York Times* reported that "Reagan Administration officials" had stated that the CIA had helped to plan the attack on Corinto, as well as other attacks of the same kind (Memorial, Ann. F, pp. 94-95). Such claims by officials made on the record to the press corroborate the other evidence available on the particular point.

The entire episode confirms the direct involvement of the United States in armed attacks against Nicaraguan targets.

The Mining of Nicaraguan Harbours

I shall now turn to the mining of Nicaragua's harbours under the direction of the CIA in the period from January to April 1984 (see Memorial, paras. 96-98). The mining programme had been approved by the President and formed part of a policy of economic warfare. In April of last year Congress became aware of the programme and there was something of a scandal. The facts were not denied by the Administration: indeed, they were admitted. When questioned on the subject of the mining programme, the President stated: "Those were home-made mines that couldn't sink a ship . . . I think that there was much ado about nothing." (Memorial, Ann. C, I, 6.)

There is no denial that the "nothing" related to activities of the United States. The President simply did not dispute the facts. Nor were the facts disputed in the course of proceedings on Nicaragua's Request for Interim Measures of Protection. Moreover, on 16 April 1984, George Lauder made a public statement on behalf of the CIA (Memorial, Ann. C, II, 5). In this the official made the following express admission:

> "During the 13 January 1981 Senate Select Committee on Intelligence hearing on the nomination of Mr. Casey to be Director, CIA, Mr. Casey said:
>
> > 'I intend to comply fully with the spirit and the letter of the Intelligence Oversight Act. I intend to provide this Committee with the information it believes it needs for oversight purposes.'
>
> Mr. Casey believes the record will reflect that he and his staff have kept that pledge. A chronology of briefings of the Congressional Oversight Committee in connection with events in Central America reveals that from December 1981 through March 1984, either the director or deputy director briefed the Congressional Committees 30 times on Central America.
>
> Moreover, from 16 September 1983 through 2 April 1984, other officials of CIA briefed either the committees or the committee staff 22 times on Central American developments. Since the first of this year, the subject of mining of Nicaraguan ports has been discussed with members or staffers of the committees and other members of the Congress 11 times."

The mining of harbours has a special significance since, like the Corinto attack, it provides evidence of a system, a general programme, of hostile operations directed by the United States Government and under its control. Moreover, both episodes produced situations in which the Administration acknowledged its responsibility in unqualified terms, either by failure to deny responsibility when a denial would normally be called for, or as a consequence of express admission.

The Views of Third States

In concluding my remarks about the mining of harbours, I would respectfully remind the Court that third States whose shipping was damaged by mines in Nicaraguan waters made representations to Washington. The States making such representations included the United Kingdom and the Soviet Union (Memorial, para. 481).

My argument concerning the acceptance or recognition of responsibility is now concluded and, with your permission Mr. President, I shall turn to another set of problems which are partly issues of State responsibility and partly related to questions of evidence.

Bases of Responsibility

The evidence in the present proceedings relates to a programme of more or less covert operations including both military and paramilitary action. The operations vary from sudden attacks on coastal targets to special operations across the frontiers — the frontiers with Honduras in particular. The personnel involved are sometimes members of United States special forces, and are sometimes Somocistas specially organized, equipped, funded and controlled by the United States Government. The purpose of this part of my argument is to explore the different bases or models of State responsibility which may be relevant. I am not presently concerned with bases of responsibility in terms of causes of action, which I shall deal with in my second speech in these proceedings, but with the different forms in which responsibility may be attributed to the Respondent State.

My purpose will become clear when I set out the schema of analytical possibilities. The possibilities will relate to the question: what specific relationship does the United States Government bear to the military and paramilitary operations which have been and are being conducted in and against Nicaragua?

The schema is as follows.

First: direct action by means of agencies of the United States such as the Central Intelligence Agency.

Second: action by forces over which the United States Government exercises total or predominant control: that is, cases of agency.

Third: action which takes the form of assistance, in the form of training, supply of weapons, equipment and other *matériel*, technical advice, or funding: that is, cases of complicity in military or paramilitary operations by forces not falling within the first two categories.

Fourth: action which is not proved to originate with agencies of the United States, or forces controlled by the United States, which action is adopted or approved by the United States Government as an instrument of national policy.

At the outset it may be observed that these categories are not mutually exclusive. Thus, on a given occasion, and for the purposes of a particular operation, an armed band might play a role in any one of the four categories of the schema, given changing patterns of organization and political convenience on the part of the leading actor, that is, the State which takes action in the first three categories, or which adopts or approves the harmful action in the case of the fourth category.

So much for the set of possible relationships. Each analytical possibility can now be examined further.

The first category is that of direct action by the Resondent State, whether this be by means of special units of the armed forces, the Central Intelligence Agency, or a combination of personnel employed by institutions which are agencies of the United States Government. Action within this category would obviously constitute "an act of the State concerned" within the terms of Article 5 of the Draft Articles on State Responsibility adopted by the International Law Commission in 1973 (*Yearbook*, International Law Commission, 1973, II, p. 165, p. 191). Article 6 of that Draft is also pertinent. If I may remind the Court, this provides:

> "The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or a subordinate position in the organisation of the State." (*Ibid.*, p. 193.)

There is a considerable body of evidence, much of it on the public record, that the intelligence organs of the United States are directly involved in the planning and execution of hostile operations against Nicaragua, including the attack on Corinto and the programme for mining harbours in the period January to April of last year.

However, it is necessary to recognize that there exists a certain "grey area" as between my first and second categories — the two categories first in my schema. It is, in my submission, a matter of public knowledge in this part of the twentieth century, that intelligence and special operations in general use a variety of operating techniques. Agents may be full-time but employed for short or long periods. Some agents are paid retainers and may be called upon in case of need. The realities are fully reflected in Article 7 of the Draft Articles produced by the International Law Commission in the course of 1974 (*Yearbook*, International Law Commission, 1974, II, p. 276 at p. 277). Thus paragraph 2 of that Article provides as follows:

> "The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial government entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question."

Moreover, the Commission's commentary, which as the Court knows forms part of its report to the General Assembly, explains the provision in the following way:

> "With regard to the formulation of the rule, the Commission felt it preferable to cover in a single article all the cases of conduct of organs of entities which under the internal law of the State have a personality separate from the State but which are empowered by the same law to exercise certain elements of the governmental authority, whether through the application of a normal criterion of decentralisation *ratione loci* of the exercise of the governmental authority, or in order to meet a more exceptional and more limited need for decentralisation *ratione materiae* of certain elements of the governmental authority. For this purpose, the term 'entity' has been used in

> the title of the article as being the most neutral term and the easiest to translate into the various languages, and also as a term wide enough in meaning to cover bodies as different as territorial governmental entities, public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies." (*Yearbook*, International Law Commission, 1974, II, pp. 282-283, para. 19.)

Mr. President, it is clear that, at the end of the day, the touchstone is agency and control by the State concerned and that, in actual experience, what I have called the "grey area" between category one and category two creates a significant overlap between my first category, that of direct action, and my second category, namely, action by forces over which the Respondent State exercises either total or predominant control; that is, cases of agency.

This situation may be covered by the provisions of Article 7, paragraph 2, of the International Law Commission draft, and this especially when the internal law of the State provides an express source of powers. In this connection, I would respectfully draw the attention of the Court to the terms of various United States Statutes set forth in Annex D of the Memorial and, in particular, to section 108 of Attachment 4, which is the text of the Intelligence Authorization Act for Fiscal Year 1984.

The situation of agency and control may also fall within the provisions of Article 8 of the Commission's Draft Articles on State Responsibility. This Article has the heading "Attribution to the State of the conduct of persons acting in fact on behalf of the State", and it provides as follows:

> "The conduct of a person or group of persons shall also be considered as an act of the State under international law if
>
> (*a*) it is established that such person or group of persons was in fact acting on behalf of that State; or
>
> (*b*) such person or group of persons was in fact exercising elements of the government's authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority." (*Yearbook*, International Law Commission, 1974, II, p. 283.)

Mr. President, the issue is always ultimately that of State responsibility and this is clearly generated whenever there is sufficient evidence of agency or control. It is implicit in the Draft Articles that it is not the formal status of the agent's principal relationship which is the governing principle but the existence of agency and control. The learned Commentary of the Commission attached to Draft Article 8 is of very great relevance: *Yearbook*, International Law Commission, 1974, II, pages 283-285, paragraphs 2-8. The issue of principle is dealt with in the following passage. In the words of the Commission:

> "(2) The hypothesis contemplated in sub-paragraph (*a*) was intended by the Commission mainly to cover cases in which the organs of the State supplement their own action and that of their subordinates by the action of private persons or groups who act as 'auxiliaries' while remaining outside the official structure of the State. In the same context the Commission wished to deal with the familiar cases in which the organs of the State or of one of the other entities empowered by internal law to exercise elements of the governmental authority prefer, for varied and in any case self-evident reasons, not to undertake certain tasks themselves. They then make use of persons who are not formally part of the State machinery or of the machinery of any of the other entities mentioned; they call upon private individuals or

> groups of private individuals to take on the duties and tasks in question, although here again these individuals or groups are not thereby formally attached to the structures in question and do not, in other words, thereby become *de jure* organs of the State or of the other entities mentioned. The Commission, also bearing in mind the important role played by the principle of effectiveness in the international legal order, considered that that order must of necessity take into account, in the cases contemplated, the existence of a real link between the person performing the act and the State machinery rather than the lack of a formal legal nexus between them. The conduct in which the persons or groups in question thus engage in fact on behalf of the State should therefore be regarded under international law as acts of the State; that is to say, as acts which may, in the event, become the source of an international responsibility incumbent on the State."

I would thank the Court for its patience listening to that long excursus. The view of the law expressed by the Commission is well supported by individual judicial decisions and the practice of States (*ibid.*, paras. 3-5). One example of the State practice may be of particular interest, and it concerns the Spanish Civil War. On the Republican side in that conflict a number of organizations and groups of volunteers were involved as combatants, under the control of the Government but not being in formal terms a part of the Republican armed forces. In the opinion of the Swiss Government, the Spanish State was to be held responsible for illegal acts committed by such military organizations, and claims for reparation were accordingly presented to the Spanish Government: see *Répertoire Suisse de droit international public*, III, pages 1698-1699 (items 8.12 and 8.13).

In the present proceedings the documentary record contains a pattern of evidence which establishes that the forces which carry out military and paramilitary operations in and against Nicaragua are in a relation of agency with the United States and subject to its exclusive direction and control. The record is consistent and the pattern is clearly visible. The planning, logistics, the funding, the choice of strategy, the political objectives, all these are under the direction and control of United States Government agencies. The operations are an instrument of United States national policy and they figure prominently in defence appropriation legislation. The personnel are hired by the United States and form bands of professional mercenaries, acting as agents of the United States Government.

I now come to the third element of my schema of possibilities: that is, action which takes the form of assistance to, or complicity in, military or paramilitary operations and which does not fall within the first two categories. This is, so to speak, the basis of liability which presents the least difficulties of proof. On this hypothesis the relationship of agency and control would not stand in need of proof.

Looking back at the three elements I have presented so far, that is direct action, agency and control, and, lastly, complicity, each would provide an independent and sufficient basis of liability. But that does not exhaust the analysis since the express declarations and admissions by senior United States officials have a considerable impact on the case. Such statements have evidential significance of various kinds and this I have already indicated in my speech. They also lead to the fourth and final element in my schema: that is action which is not proved to originate with agencies of the United States, or forces controlled by the United States, but which is adopted and approved by the United States Government.

As the Memorial (**IV**, pp. 73-74) has indicated, the highest echelons of the United States Government have repeatedly adopted and approved the acts of the mercenary forces in and against Nicaragua. The relevant evidence has been reviewed elsewhere. In the *United States Diplomatic and Consular Staff in Tehran* case the Court was particularly concerned with the second phase of the events when, following the occupation of the Embassy, expressions of approval came "from numerous Iranian authorities, including religious, judicial, executive, police and broadcasting authorities" : *I.C.J. Reports 1980*, page 33. From this evidence the Court drew the following important conclusion. In the words of the Judgment :

> "74. The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible . . ."

The situation involving adoption or approval of a course of action is the last of the four elements in my schema of bases or possible bases of liability which I have presented to the Court.

Whilst I believe this analysis has its own validity, it is subject to qualification and refinement in certain respects.

The first qualification concerns the relation between the analysis and the causes of action, that is to say, the substantive sources of obligation, on which the Applicant State relies.

The point can be illustrated by two examples. A number of the rules relied upon in the Application and the Memorial use the term "use of force", and the Memorial demonstrates that this term includes certain forms of indirect aggression, amongst which is the use of armed bands (**IV**, pp. 60-65, 69-72). Moreover, there is considerable authority for the view that assistance to groups of insurgents on the territory of another State falls within the concepts of armed attack or armed aggression. Thus, the formation of the relevant rule of law may cut across the four separate categories of my schema, and thus also the concept of the "use of force" may in the circumstances relate to each and every one of the four bases of liability.

A second example may be given. A number of rules relied upon by Nicaragua, both in general international law and in multilateral treaties, prohibit direct or indirect intervention in the internal or external affairs of any State — as, for example, the provisions of Article 18 of the Organization of American States Charter. It is evident that forms of assistance to armed bands operating against a State fall foul of the prohibition against intervention, just as much as the categories of direct action and of agency and control as bases of liability.

In brief, the formation of the rule of substance determines the precise content of the obligation and the standard of conduct. And the important consequence of this is that the difference between the four types of involvement has a much reduced significance.

The Acceptance or Recognition of Responsibility

The second qualification or refinement of my analysis of the bases of liability relates back to my argument that, by its express declarations and admissions, the United States has become liable for the military and paramilitary operations directed against Nicaragua as a result of its acceptance or recognition of responsibility. I refer to that argument once more only for the purpose of pointing out that this independent basis of liability also cuts across the four analytical possibilities, since it recognizes responsibility for the consequences whichever factual hypothesis be applicable.

Moreover, whilst acceptance or recognition of liability is similar to the fourth category — that is, of adoption or approval — it is distinct from it in a critical respect. Acceptance of responsibility is a basis of liability which extends to all four categories, and not only to those factual situations in which responsibility could arise only as a consequence of approval or adoption.

Consequential Issues

Mr. President, in completing this sector of my speech, I would like to refer the Court to a consequential issue. The analytical schema distinguishes responsibility in four situations: first, direct action by the Respondent State; second, action by forces which are controlled by, and thus are agents of, the Respondent State; third, the cases of complicity; and fourth, action not falling within the other categories which is adopted or approved by the Respondent State.

No doubt the damage and loss may be allocated, so to speak, among the four bases of liability. Alternatively, the damage and loss may be related exclusively to a single basis of liability. The question which then arises would be: does the system of allocation or selection of bases of liability affect the issue of quantum of damages?

In my submission, the legal liability should be solidary and, therefore, as a matter of principle, the quantum should not be affected by the selection of, say, agency and control as a basis, as opposed to complicity alone as a basis.

This approach on the basis of solidary responsibility is in accordance with general principles of law and the practice of States before international tribunals.

It is the common practice in national legal systems to allow full recovery of damages in respect of one of several forms of action, providing that these all relate to the same damage. No discrimination is made between different forms of illegality in this respect. The picture may be more complicated in a case in which one form of action is based upon *culpa* and another upon *dolus* in relation to the same damage. But that type of situation is no more than of academic interest for present purposes. Moreover, in national systems, most of the problems in practice arise from the distinctions between claims in contract and claims in tort, or between these and the remedies of pure restitution.

In the context of international law, the practice of States in front of international tribunals appears to be based on the assumption that success on the basis of one cause of action will draw in its train full reparation. Thus in the *Barcelona Traction, Light and Power Company, Limited* case, the Belgian Memorial, in which many jurists had had a hand, presented the facts relied upon in terms of four legal categories. However, the claims for reparation were not apportioned to these heads separately, but to each and all of them. There is no reason to believe that that course was eccentric, and it evoked no criticism from professional opinion.

Indeed, in the circumstances of the present case, the solidary approach, so to call it, is particularly to be commended. The delictual conduct forms a coherent pattern of activity directed to a common illegal purpose, the forcible overthrow of the lawful government of the Applicant State. Moreover, the declarations and admissions which form part of the public record relate comprehensively to the military and paramilitary operations against Nicaragua, which operations have been provided for in United States Statutes during the material period.

The Standard of Proof

That brings my review of the different bases of liability to a final conclusion. My review of the evidential problems in this case has, so to speak, set the scene for my remarks on a question which has been left on one side so far, that is, the standard of proof. The Applicant State has evoked a considerable volume of evidence in support of a case which involves substantial issues of State responsibility. Moreover, the case brought by Nicaragua rests exclusively upon intention or *dolus* as the basis of responsibility, rather than objective responsibility.

It is well known that charges of exceptional gravity against a sovereign State or its government require to be established by conclusive evidence involving a high degree of certainty. This proposition was adopted by Sir Gerald Fitzmaurice (*British Year Book of International Law*, Vol. 29 (1952), pp. 57-58), who cited this Court in the *Corfu Channel* case. In that case, it may be recalled, the Court was reluctant to accept the allegation that a third State had been responsible for the laying of mines in Albanian waters and, in that context, the Court made a general statement as follows: "A charge of such exceptional gravity against a State would require a high degree of certainty that has not been reached here" (*I.C.J. Reports 1949*, p. 17).

That statement of the standard of proof applies, at least *in limine*, to the present case, of course, but when a principle is applicable, it is to be applied *sub modo* and taking account of all relevant circumstances. Moreover, the *dictum* in the *Corfu Channel* case must be placed carefully within its context. Thus it was related to a charge against a State not involved in the proceedings and this factor must have influenced the insistence upon a fairly rigorous standard of proof. It is also highly significant that in the *Corfu Channel* case, when approaching the issues as between the parties, which also involved matters of exceptional gravity, the Court appears not to have employed such an exacting standard of proof.

But all this is to some extent beside the point, Mr. President, the standard of proof must depend upon the forensic geography of the particular case. In this case, Nicaragua has sought to assist the Court by presenting the evidence as fully as possible, and it has not relied upon the first paragraph of Article 53 of the Statute. And yet the Applicant State is fully justified in pointing out to the Court the precise nature of the standard of proof in the circumstances of the present case. In my respectful submission the standard of proof is to be determined in the light of three factors which operate together but are also independently valid.

(a) *The effect of Article 53*

In the first place, the provisions of Article 53 of the Statute dictate a certain liberalism of approach. Thus in the *United States Diplomatic and Consular Staff in Tehran* case the Court outlined the position in this way:

> "11. The position taken up by the Iranian Government in regard to the present proceedings brings into operation Article 53 of the Statute, under

which the Court is required *inter alia* to satisfy itself that the claims of the Applicant are well founded in fact. As to this article the Court pointed out in the *Corfu Channel* case that this requirement is to be understood as applying within certain limits:

> 'While Article 53 thus obliges the Court to consider the submissions of the Party which appears, it does not compel the Court to examine their accuracy in all their details; for this might in certain unopposed cases prove impossible in practice. It is sufficient for the Court to convince itself by such methods as it considers suitable that the submissions are well founded.' (*I.C.J. Reports 1949*, p. 248)." (*I.C.J. Reports 1980*, p. 3 at p. 9.)

(b) *Absence of any denial of the facts*

The Government of Nicaragua has pointed out in its Memorial that it does not intend to rely upon the formal procedural possibilities of Article 53, and it is the actual circumstances of the present case which have the formative influence upon the standard of proof. The first such influence is the absence of any denial of the facts by the Respondent State. In the first phase of this case the United States simply refused to enter into the issues of fact raised by the Application, but there was an exception to this in that the United States asserted that the defence of collective self-defence was available on the facts. But in this case no evidence is to be given to support this assertion by the Respondent State. The result of the non-appearance of the Respondent is the absence of any denial of the facts and this outcome is, of course, not the result of the provisions of Article 53, as such, but is an independent element in the case.

The absence of any denial of the facts placed before the Court by the Respondent is an element in the procedure by which the Court decides whether the averments of fact by the Applicant are well founded within the meaning of Article 53 of the Statute, or are otherwise established. The Court took this position in the *United States Diplomatic and Consular Staff in Tehran* case (*I.C.J. Reports 1980*, p. 10, para. 13 (and see also the *Fisheries Jurisdiction* case (*United Kingdom* v. *Iceland*) *Merits, I.C.J. Reports 1974*, p. 9, para. 16)). Another way of expressing the matter would be to say that the mode of applying the standard of proof must naturally reflect the absence of denial on the part of the Respondent State, and the nature of the facts which are not denied.

(c) *Express indication of illegal purpose and responsibility for illegal actions*

But it is understood that an absence of denial of itself may not enable the Court to establish whether the submissions of the Applicant are well founded. And yet the absence of denial in this case complements, affirms and reinforces the evidence in general presented by the Applicant. This evidence is, in the words used by the Court in the *United States Diplomatic and Consular Staff in Tehran* case "wholly consistent and concordant as to the main facts and circumstances of the case" (*I.C.J. Reports 1980*, p. 10, para. 13). There is a massive public record which includes a large number of statements by President Reagan and other senior officials of the United States. In these statements the President and his staff give express indications of an illegal purpose and policy, namely, the overthrow by violent means of a lawful government. As I have already sought to demonstrate, these reiterated public assertions constitute an acceptance of legal responsibility for the actions complained of by Nicaragua in these proceedings.

The absence of denial of the facts is not the result of a policy of non-appearance: it is the major complement, the close relation, of the arrogant public assertions of an illegal enterprise by the Chief Executive of the Respondent State and his colleagues. The President's response to a question directly relating to the attack on Corinto at a news conference on 19 October 1983, to which I have already referred, is but one example of positive affirmation of a blatantly unlawful policy (Memorial, Annex C, I, 2). If I may refresh the Court's memory of this episode. The question put, was:

> "Mr. President, regarding the recent rebel attacks on a Nicaraguan oil depot, is it proper for the CIA to be involved in planning such attacks and supplying equipment for air-raids? And do the American people have a right to be informed about any CIA role?"

The President's reply was:

> "I think covert actions have been a part of government and a part of government's responsibilities for as long as there has been a government. I'm not gong to comment on what, if any, connection such activities might have had with what has been going on, or with some of the specific operations down there.
>
> But I do believe in the right of a country when it believes that its interests are best served to practice covert activity and then, while your people may have a right to know, you can't let your people know without letting the wrong people know, those that are in opposition to what you're doing."

It is in the nature of the public record in this case which must influence the application of the standard of proof to be applied to the submissions of the Applicant State. The principle that a higher standard of proof is required in cases of exceptional gravity is, so to speak, pre-empted when the existence of a general policy of hostility, and the practice of covert activity, is a matter of public record and is proclaimed as a State policy and programme of action. In other words, the Respondent State has either rendered that particular standard inapplicable by its own acts, or by these acts has substantially removed any element of reasonable doubt. As a matter of ordinary logic, the only issue outstanding is really that of modalities, and with respect to modalities, in my submission, reasonable certainty is the standard of proof appropriate in the circumstances of the present case.

System, Policy and Resulting Breaches of International Law: Evidential Connections

Mr. President, I have now completed my agenda. The last section of my presentation will draw the various threads together, and will indicate the general form and structure of the evidence in these proceedings.

The evidence may be described as consisting of three principal elements:

1. The evidence of armed attacks, the mining of harbours and the recurrent pattern of aggression, terrorism, murder and sabotage, in each case affecting Nicaraguan territory, Nicaraguan waters, Nicaraguan citizens and the Nicaraguan economy.

2. The existence of a system and a pattern of military and paramilitary operations directed against Nicaragua.

3. A series of declarations and admissions by the President of the United States and other senior officials involving unequivocal acceptance or recognition

of legal responsibility for the military and paramilitary operations, including the attack on Corinto and the programme for the mining of Nicaraguan harbours, and evincing a general policy of hostility with a specific and manifestly illegal purpose.

With your permission, Mr. President, I would like to remind the Court of the impressive number of elements which constitute a consistent pattern of intentions, purposes and methods of implementation over a long period.

Those elements are as follows:

(1) The sequence and coincidence of the authorization of financing by Congress and the subsequent practical steps taken by way of implementation.
(2) The persistent recruiting and employment of armed forces based on the territory of Honduras and paid and maintained by the United States.
(3) The carrying out of regular attacks by such units against targets on the territory of Nicaragua in accordance with policy directives of the United States.
(4) The continuous funding of such operations by the United States either within the limits set by Congress or at times outside those limits.
(5) The intention on the part of the United States to cause damage to Nicaragua, to exert pressure generally for political ends and, in particular, to bring about the forcible overthrow of the Government of Nicaragua.
(6) The use of particular mechanisms described as covert action involving the Central Intelligence Agency and its operational resources.
(7) Prior to April 1984, the absence of any pretence or assertion of the existence of any legal justification for the activities of the guerrillas acting on behalf of the United Staes.

This consistent pattern of evidence justifies the inference that the events concerned are connected, and are part of a deliberate, concerted and long persistent policy and programme. The system or pattern visible in the record excludes the possibility of an explanation compatible with the innocence of the Respondent State.

The substance and reality of this system or pattern is evidenced in a variety of ways, including the repeated appearance of express authorization of operations by Acts of Congress and the systematic efforts of the Administration to increase the level of funding over a period of four years.

The significance of the pattern, the sharpness of the image, is increased as a consequence of the long series of express admissions by the President and other officials.

Both in the *Corfu Channel* case (*Merits, I.C.J. Reports 1949*, pp. 18-20) and the *United States Diplomatic and Consular Staff in Tehran* case (*I.C.J. Reports 1980*, pp. 33-35, paras. 70-75) the Court in its Judgments accorded considerable probative value to the attitude and general policy of the governments concerned as revealed by express public statements and the general course of conduct.

In evaluating the relationship between the general — that is, the evidence of general intention and polices of implementation — and the particular — namely, particular military operations, sabotage raids and other episodes of hostility — the mutuality and logical interconnections of the two are to be fully appreciated. On the one hand, the express declarations of intent and admissions of general involvements in military and paramilitary operations give significance and point to individual episodes of aggression and terrorism within Nicaragua. On the other hand, specific hostile episodes provide reliable proof of the general intention and *modus operandi* of the authors of such individual episodes.

This evidential link between specific incidents and the proof of a general practice or system of breaches was recognized in the judgments of the European Court of Human Rights in the case of *Ireland v. United Kingdom*. With your permission, I will read the relevant passage in the judgment:

> "The allegation accepted by the Commission under Article 3 concerned a practice or practices and not individual cases as such. Accordingly, the Court's sole task is to give a ruling on that allegation.
>
> However, a practice contrary to the Convention can result only from individual violations ... Hence, it is open to the Court, just as it was to the Commission, to examine, as constituent elements or proof of a possible practice and not on an individual basis, specific cases alleged to have occurred in given places.
>
> The Court concludes that it has jurisdiction to take cognizance of the contested cases of violation of Article 3 if and to the extent that the applicant Government put them forward as establishing the existence of a practice." (*Publications of the European Court of Human Rights, Series A*, Vol. 25, p. 63, para. 157.)

In moving to my conclusion I must bring to the Court's attention three factors which should, in my respectful submission, be taken into account in weighing up the evidence, both in determining the existence of a system or pattern and more generally.

The first factor, if I may mention it again, is the absence of any denial of the facts by the Respondent State, by evidence presented in these proceedings.

The second factor is the predominant and long-stated purpose of the operations against Nicaragua, which is the overthrow of the present Government on grounds of a purely political character, namely, the national interest of the United States. There is no evidence that the creation, maintenance and servicing of the base camps in Honduras was related to any genuine motive of collective self-defence. There is no evidence that the Governments of Honduras or El Salvador have requested assistance from the United States for this reason.

Mr. President, I would recall the diplomatic notes sent by the Governments of El Salvador and Honduras to the Registrar of the Court and the Secretary-General, respectively, in April of last year ... I refer to the Annexes to the Counter-Memorial submitted by the United States on 17 August 1984 (Nos. 103, 104). These documents make reference to Article 33 of the United Nations Charter but there is no reference to Article 51 of the Charter, or otherwise to the concept of collective self-defence. The omission is surely significant.

And in this same context I would draw the attention of the Court to the report submitted to Congress by Secretary Shultz on 15 March 1984 pursuant to section 109 *(j)* of the Intelligence Authorization Act of 1984 (United States Counter-Memorial, No. 95). This document was published by the United States Department of State with the title *US Efforts to Achieve Peace in Central America*.

There is no reference in this fairly substantial report to the taking, or to the necessity of taking, action by way of collective self-defence. It is, of course, notable that this report was published prior to the presentation of Nicaragua's Application on 9 April. However, even when proceedings were envisaged by the United States, and the wind seemed to grow cold, the United States officials still did not have collective self-defence in the forefront of their minds. Indeed, it was not present at all. Thus the departmental statement, which accompanied the famous Shultz letter of 6 April 1984 to the Secretary-General, contains no reference to action by way of collective self-defence and this, Mr. President, is in a context where it would be expected since that statement had an overtly argumentative and political tone. No doubt, the United States did eventually make a temporary attachment to collective self-defence, but this was in the face of litigation, was unrelated to reality, and was self-serving.

The third factor to be taken into account in weighing the evidence is the principle which is well recognized: that the Applicant State may rely on inferences of fact and circumstantial evidence when, by reason of the exclusive territorial control of the Respondent State — or of third States — the Applicant is unable to furnish direct proof of facts giving rise to responsibility.

This principle was stated and applied by the Court in the *Corfu Channel case* (*Merits, I.C.J. Reports 1949*, p. 18), and also in its Judgment in the Jurisdiction phase of these proceedings (*I.C.J. Reports 1984*, p. 437, para. 101). It is also given prominence by authoritative publicists, including O'Connell (*International Law*, 2nd ed., 1970, II, p. 1098) and Rosenne (*The Law and Practice of the International Court*, 1965, I, p. 582). The principle has also received the notice and approval of two former Judges of the Court: Sir Gerald Fitzmaurice (*British Year Book of International Law*, Vol. 29 (1952), p. 59), and Sir Hersch Lauterpacht (*The Development of International Law by the International Court*, 1958, p. 88).

This principle was also relied upon in the Memorials of the Governments of Israel, the United States and the United Kingdom in the *Aerial Incident* case (see *I.C.J. Pleadings, Aerial Incident of 27 July 1955*, pp. 101, 249 and 352/353, respectively).

To conclude on inferences of fact and indirect evidence: such evidence is not to be taken as either a superior form of evidence or an inferior type of evidence. Indeed, the distinction between direct and indirect evidence is usually over-emphasized. And this is especially so when the criteria of State responsibility have to be applied to the processes of government and to the links between covert and special operations in the field and policy-making at the top.

The principles of evidence are essentially principles of logic and common sense, and this was underlined by Judge Badawi Pasha in his dissenting opinion in the *Corfu Channel* case (*Merits, I.C.J. Reports 1949*, pp. 59-60). The evidence in each case has an individual texture. It has its own tone and morphology, rather like a language. In the present case the express admissions of responsible officials operate to confirm the truth and reliability of inferences of fact. In consequence, when what may be regarded in isolation as elements of indirect evidence, or inferences of fact, is related to the express admissions, the acceptance of responsibility, which form part of the record, the result is proof of responsibility with reasonable certainty, leaving no room for reasonable doubt.

In short, it is the interlocking of evidence and its weight in the evidential circumstances taken as a whole which counts. The fact that some of the evidence is in some sense indirect or circumstantial does not give any real indication of the value of the evidence available in the particular case. Mr. President, after preparing these observations which may perhaps seem to be common sense, I was not surprised to find the following passage in a leading work of authority on the law of evidence:

> "No useful purpose is served by a comparison of the merits of direct and circumstantial evidence. Although, in legal parlance, circumstantial evidence does not mean a detailed account of what happened (as it formerly did in popular speech), the phrase retains an important element of its original meaning when used by lawyers because circumstantial evidence derives its main force from the fact that it usually consists of a number of items pointing to the same conclusion. The blood on the accused's knife may not

> be of much significance, but additional facts, such as the accused's animosity towards the deceased, benefits to be derived by the accused from the death of the deceased, and the accused's efforts to conceal the knife may give it a very damning complexion." (Cross on *Evidence*, 5th ed., London, 1979, p. 11.)

Summary of Principal Conclusions

Mr. President, I have now reached my summary of principal conclusions.

1. The consistent pattern of express admissions of responsibility by the President of the United States and other leading officials forms part of the public record in this case, together with the evidence of the Administration's persistent approaches to Congress for the funding of military and paramilitary operations in and against Nicaragua.

2. Express admissions made on behalf of the United States and which are adverse to its case are relevant to the claim of Nicaragua in three ways:

First, such express admissions provide cogent evidence of United States control over mercenaries carrying out operations against Nicaragua.

Second, such admissions contribute direct evidence of intention and purpose in relation to United States assistance to and control over forces operating against Nicaragua.

Third, such admissions are evidence of the responsibility which the United States bears for the military and paramilitary operations.

3. The express declarations of responsible United States officials involve an acceptance or recognition of legal responsibility which, in the circumstances, constitutes an independent basis of legal responsibility in this case.

4. The evidence on the public record of acceptance or recognition of responsibility is confirmed by other evidence, including the sporadic and temporary reliance by United States officials upon the concept of collective self-defence; the official attitude to the news of the attack on Corinto and to the programme of mining; and the determinations of third States when their shipping was damaged as a result of the mining of Nicaraguan harbours.

5. The reference to collective self-defence by officials of the Respondent State cannot provide any basis of legal justification for United States actions since:

First, no evidence is produced in this Court by the Respondent State to support such a defence.

Second, the express declarations of the President and other officials make clear the fact that the real purpose of the military operations directed by the United States is the overthrow of a lawful government, which goal has nothing in common with self-defence.

Third, the tactics of terrorism directed against the civilian population of Nicaragua, like the mining programme, are entirely incompatible with the concept of self-defence.

6. The evidence adduced by the Applicant State amply proves the existence of a system or consistent pattern of intentions and activities on the part of the United States. The consistency of the pattern justifies the inference that the events form part of a coherent and deliberate policy, involving specified goals, pre-arranged funding, and implementation in the form of recurrent military and paramilitary operations.

7. Responsibility for military and paramilitary operations may be incurred in four types of situation:

First, direct action by the Respondent State.

Second, action by forces which are controlled by, and thus are agents of, the Respondent State.

Third, cases of assistance or complicity.

Fourth, action not proved to be within the other categories which is adopted or approved by the Respondent State.

8. There is a significant overlap between the first two categories and, within these two categories, the ultimate test is that of agency and control, and not the formal status of the individuals or forces employed.

9. In any case the significance of the distinction between the four situations is much reduced by other factors, including the manner in which the primary or substantive rules of the law are formulated and the existence of an acceptance or assumption of responsibility on the part of the United States.

Mr. President, I have now concluded. I thank you and your colleagues for your patience.

The Court rose at 1.05 p.m.

TWENTY-FOURTH PUBLIC SITTING (19 IX 85, 3 p.m.)

Present: [See sitting of 12 IX 85.]

ARGUMENT OF PROFESSOR CHAYES

COUNSEL FOR THE GOVERNMENT OF NICARAGUA

Professor CHAYES: Mr. President, Members of the Court: may it please the Court.

It is my function today to complete the presentation of Nicaragua's claims under the great international charters that regulate the fundamental relations of States in the world and in the region where both of the Parties to this case are situated. I shall speak briefly, for these matters have been exhaustively treated in the Memorial. I will touch on four main issues.

First, Article 2 (4): the United Nations Charter prohibition on the use of force.

Second, the comparable provisions of the Charter of the Organization of American States.

Third, the multilateral treaty reservation to the United States declaration under Article 36 (2) of the Statute of the Court.

Fourth, the question of self-defence.

ARTICLE 2 (4)

It has taken a long time, but we have finally come to the issues of substantive law in this case. We are no longer talking about provisional measures or jurisdiction or points of procedure, important though those are. We have reached the core question that gives this case its historic significance: what is the scope, under Article 2 (4) of the United Nations Charter of the permissible use of force by States in the conduct of their international relations?

I need not tell the Court that this is a favourite topic of publicists, some of whom are also present or former Members of this Court. But this will be the first time that the Court will speak comprehensively and authoritatively on the meaning of Article 2 (4).

The voluminous scholarly writing on the subject is arrayed and fully analysed in Nicaragua's Memorial filed on 30 April 1985. The Court will perhaps be relieved to hear that we have discovered nothing new on the subject since that date. I cannot think that yet another review of the authorities, weighty though they be, will be very helpful to the Court at this stage. Instead, Mr. President and Members of the Court, I ask you to consider Article 2 (4) in its fundamental aspect, for you must give life and meaning to its language and to its aspirations in the circumstances of international life at the beginning of the twentieth century.

It hardly bears repeating here that Article 2 (4) is the keystone of the Charter. It is the language in which a war-weary generation invested much of its hope for the future.

"All Members shall refrain in their international relations from the threat

> or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

It is a commonplace that what the draftsmen of the Charter had in mind in forming Article 2 (4) was old-fashioned transborder aggression, carried out by the uniformed armed services of a State. Statesmen, no less than generals, have a penchant for fighting the last war.

Old-fashioned transborder aggression has not disappeared since 1945. We seem to have had an example in Angola, only the other day. But we know it when we see it, and legal questions about it ordinarily centre around the issues of justification and defence.

It is also common ground that Article 2 (4) was not to be confined to old-fashioned transborder aggression. It had already become apparent in the early years under the Charter that States, particularly great States, had means for imposing their will on others by force, or the threat of force, without sending troops. In an era of spreading independence of former colonies, wars of liberation, unstable and shifting regimes, and ideological struggle, the intellectual battleground among international lawyers has been: how far beyond the notion of transborder aggression does Article 2 (4) go? How much less than actual use of troops is required?

As a starting point for our analysis, I put it to the Court that if the armed actions shown on this record had been carried out by the armed forces of a State, there could be not the slightest hesitation in saying that they constituted a use of force by that State.

But, of course, a significant portion of the acts of the United States, charged by Nicaragua as violating international law were in fact carried out by persons who were, in effect, armed forces of the United States. I speak now of the attacks, beginning in September of 1983 and extending through April of 1984, levied against the oil supply facilities and the ports of Nicaragua.

I read aloud in Court yesterday an extraordinary account of a meeting between Duane Clarridge, a senior officer of the United States Central Intelligence Agency, and some of the Nicaraguan leaders of the covert operation he was responsible for running. He told them that the CIA had decided it was necessary to destroy the oil supply system of Nicaragua. What was the reason? "Because without oil the Nicaraguan military would be immobilized and its capacity to resist our forces would be drastically reduced." (Supp. Ann. G, para. 20). I think the Court will have to look hard to find that a permissible purpose.

Clarridge next reviewed with them the alternatives that the CIA had considered. First there was a plan to sink ships, but "one problem with this plan was that if a ship belonging to the Soviet Union were sunk it could trigger a serious international incident" (*ibid.*). Then there was a plan to bomb the Managua oil refinery, the only one in Nicaragua. "However, the refinery was located in a densely populated area, and the civilian casualties resulting from such an attack would be politically counterproductive." (*Ibid.*) So the CIA settled on a plan to destroy the oil pipelines at Puerto Sandino and the other oil facilities on Nicaragua's Pacific coast (*ibid.*).

Within weeks after this conversation the attacks began. The "troops" — if I may call them that — may have been called by a demeaning epithet: Unilaterally Controlled Latino Assets — but they were in the employ of the United States. They were under the command of United States military and intelligence officers, including direct operational command during the course of the attacks. They were supported by helicopters manned by pilots in the uniformed service of the United States. And the dispatches reporting their actions to headquarters did not fail to report Nicaraguan casualties. (Suppl. Ann. C, para. 21; Ann. C, Attachment III-3; Ann. F, No. 48, p. 89; No. 72, p. 125; No. 98, p. 168; No. 99, p. 169; No. 104, p. 176; No. 188, pp. 284-287.)

These attacks constituted an indisputable use of force in the old-fashioned sense. There can be no question of justification — by way of self-defence or otherwise. It does not take an international legal scholar to see that. Senator Barry Goldwater, Chairman of the Senate Intelligence Committee, did not mince any words about it. He said: "That is a violation of international law." (Ann. F, Attachment 9.) The Court should not hesitate to say so too.

It appears, however, that these attacks have ceased. The public revelation that they were going on caused a storm of protest in the United States. The result, however, was perhaps not uninfluenced by the proceedings in this Court. Those who ask "how many divisions has the Court?" would do well to consider the chronology: the UCLA attacks and the mining of Nicaraguan waters came to a climax at the very end of March 1984. Nicaragua filed its Application in this case on 9 April (see Ann. F, No. 89, p. 153; No. 90, pp. 154-156; No. 83, p. 145).

But if those attacks have ceased that is not enough. The gravamen of this case is the depradations of the *contra* army and the effort organized by the United States to overthrow the Government of Nicaragua. It is to get these actions stopped that Nicaragua has come to the International Court of Justice.

The *contra* attacks go on, however, just as you have heard them described by eye-witnesses before the Court. And, as you also heard, last June they received a new infusion of 27 million dollars of so-called "non-military" United States aid (Supp. Ann. A, IV, pp. 374-376; Supp. Ann. C, Attachment 7). Non-military aid which was followed in a few weeks by renewed *contra* offensive. Moreover, Nicaragua's claims for compensation cover the consequences of the *contra* attacks from their beginning in December 1981. So we must return to the earlier question: how far beyond the actual use of a State's own troops or its own employees does the prohibition of Article 2 (4) extend?

In a technical sense this question is treated under the heading of "State responsibility" or "imputability", and I have no quarrel with those analytic categories. But I do not want them to obscure the realities of this case.

I have already suggested in very brief terms the circumstances of current international life that make this problem an important one. In such conditions, irregular or guerrilla warfare is an endemic condition in many countries. And, again, given those circumstances, those fighting within a country will often have ties to persons and even governments outside. The problem has been to distinguish the "use of force" within the meaning of Article 2 (4) from lesser involvement by the outside State. That is not to say that lesser involvement may not also be a breach of that State's duties under international law. But on the present branch of the case we are speaking about use of force, and we must find a means of evaluation that gives proper effect to both of those words.

I want to turn now to some of the efforts that have been made to grapple with that problem. The following passages, which I will simply quote *seriatim*, are drawn from the writings of publicists and the declarations of various international institutions. You will recognize that they are not intended to be exhaustive. They could hardly be, given the time available for this hearing. And they are not advanced to support any particular set of criteria. They are intended rather to give us a sense of key elements that seem to emerge in any serious treatment of the subject.

Professor Brownlie writes:

> "The use of volunteers under governmental control for launching a

> military campaign or supporting active rebel groups will undoubtedly constitute a 'use of force'. It is the question of government control and not the label 'volunteer' or otherwise which is important." (I. Brownlie, *International Law and the Use of Force by States*, pp. 371-372 (1963).)

After an extensive study of the problem of defining aggression, the Secretary-General of the United Nations concluded in 1952:

> "The characteristic of indirect aggression appears to be that the aggressor State, without itself committing hostile acts as a State, operates through third parties who are either foreigners or nationals seemingly acting on their own initiative." (*Question of Defining Aggression: Report of the Secretary-General*, 56 UN doc. A/2211, 30 October 1952.)

Some 20 years later, the United Nations finally adopted a Definition of Aggression. Article 3 specifies certain acts that shall "qualify as aggression", including:

> "The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, [the acts listed above were bombardment, invasion, and so on] or its substantial involvement therein." (Art. 3 (g) of the United Nations Definition of Aggression, G.A. res. 3314 (XXIX) (1974).)

The International Law Commission has also had many occasions to address this problem:

> "(A) definition of aggression should cover not only force used openly by one State against another, but also indirect forms of aggression such as the fomenting of civil strife by one State in another, the arming by a State of organized bands for offensive purposes directed against another State, and the sending of 'volunteers' to engage in hostilities against another State." (Position of the International Law Commission, quoted in *Question of Defining Aggression: Report of the Secretary-General*, 74 UN doc. A/2211.)

Finally, former President of the Court, Eduardo Jiménez de Aréchaga elaborates the difference between the articles expressly interpreting the Article 2 (4) prohibition of the use of force and those on intervention in the 1970 Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States. Mr. President, Judge Jiménez de Aréchaga's article was in Spanish and most of the Members of this Court have already heard me try to speak French; my clients did also and they were not willing to trust me to speak Spanish so they have provided an English translation of the passage from this article, but the Spanish will appear in the transcript. He says:

> "To intervene in a civil war it is sufficient to interfere in it, for instance by a premature recognition of belligerency; to violate the prohibition on the use of force it is required to organize, instigate, assist or participate in acts of civil war or in acts of terrorism in another state."

> "Para intervenir en una lucha civil es suficiente interferir en ellas, por ejemplo, mediante un reconomiciento prematuro de beligerancia; para violar la prohibicion del uso de la fuerza se requiere organizar, instigar, ayudar o participar *en actos* de guerra civil o *en actos* de terrorismo en otro Estado. (Emphasis in the original.)" (E. Jiménez de Aréchaga, *El Derecho Internacional Contemporaneo* 140 (1980).)

We see that the authorities talk in terms of "direction and control"; "use as an instrument"; "sending" of armed bands into another State by or on behalf of the sending State; "participating in acts of terrorism, fomenting and instigating".

These terms and formulations all have much in common and I will wish to comment on that in a moment. But in any particular case, the ultimate question of liability does not yield to bright line rules. It will resolve itself into one of judgment in which the Court must evaluate the record in the light of these factors and decide whether the Respondent is to be held accountable for the actions of the irregular force, in this case an irregular force which it has created, directed, and sustained in every particular. And let me say immediately that in whatever terms the standard applicable under Article 2 (4) to indirect aggression is expressed, the case made in the record before the Court meets its requirements. The depth and breadth and intensity of the United States involvement with the *contras* at every juncture is painfully clear. Let me recall the eight broad propositions Mr. Reichler and I addressed yesterday; each established by a mass of details and mutually corroborative evidence. Seven of these speak to comprehensive United States involvement with the *contras*. (1) The United States created and organized the *contra* force; (2) armed, equipped and trained it; (3) devised the strategy and tactics; (4) provided combat support for field operations; (5) installed and paid a hand-picked civilian leadership. All this was done on the basis of policies established and carried out at the highest levels of the United States Government and finalty was for the purpose of overthrowing the Government of Nicaragua.

Despite the overwhelming character of the case, perhaps because I remain a professor at heart, I would like to make a few — perhaps unsystematic — comments relating those facts to the terms and formulations that have been used in the professional discussion of the use of force under Article 2 (4) and which we have, just a moment ago, reviewed. All these terms have a distinct active element, and properly so, given the type of distinction that is being made between use of force and some lesser degree of involvement. I do not propose these formulations as litmus tests for the use of force; they do not comprise a list of requirements all of which are necessary for liability; they provide an orientation, a sense of the direction in which we must pursue our evaluation.

Direction and control. Professor Brownlie lists the following indicia:

> "(N)umbers, central direction, size of offensive launched, . . . identification of formations and divisions . . . source of equipment, origin of the command under which the forces operate, and an absence of disavowal by the government of the state of origin." ("Volunteers", 5 *International Comparative Law Quarterly* 574 (1956).)

Nicaragua, as I am sure you will recognize, has presented evidence under each one of these heads, showing that the CIA determined the size, and it was a large size, organization, strategy and tactics of the *contra* force; supplied all its arms and equipment; and not only the CIA but the President of the United States have openly avowed and supported *contra* activities. There is no requirement that the irregulars or guerrillas must be tantamount to an organ of the outside State. And the requirement or the indicia of direction and control does not mean that individual members of these forces may not have their own desires and goals. The President asked Commander Carrión whether it was not possible that some of the *contras* were acting sincerely out of ideological or patriotic motives. Commander Carrión testified that most of them were mercenaries or forcible recruits. But he agreed that some might have held the motives suggested by the

President (p. 29, *supra*); whether they did or not, they still took orders from the CIA.

At some point in every military operation, of course, command authority is delegated to field commanders. Here, it is obvious that, except for the UCLAs, the United States participants were making an effort to avoid crossing the international border or operating on the territory of Nicaragua. There are some exceptions even to this generality: overflights for the purposes of supply drops and reconnaissance were frequent (pp. 16-17, *supra*; Ann. A, Exhibit A, p. 42).

But in the main the United States participants stayed on "their" side of the line. All this is implicit in the very idea of indirect aggression, which is defined as such by the fact that it does not involve large-scale territorial trespass by the acting State.

Instrumentality. "Direction and control" is closely allied with the concept of using an outside force as an instrument to accomplish the objectives of the controlling State. Evidence of instrumentality focuses on motives and purpose of that State, and on the methods chosen to implement its policy. Here we have both purpose and implementation. In the light of the evidence presented yesterday, there can be no doubt that the *contra* force is used as an instrument of the purposes of United States foreign policy.

The original plan of December 1981 grew out of an earlier search for ways of asserting United States authority and influence in the Caribbean and Central America, a search that included Secretary of State Haig's suggestion to "go to the source" of the opposition (Ann. F, No. 3, p. 4; No. 188, p. 282). Ultimately, it was decided that Nicaragua was an important pressure point.

Attention then turned to the rag-tag groups of ex-National Guardsmen operating on the northern borders of Nicaragua. As you heard yesterday, they were turned into a fighting force of 3,500 and then 7,000, and now perhaps 10,000 to 11,000 men — an effective military instrument (pp. 14, 18, 29). And that instrument, through the financial, strategic, logistic and operational controls exercised by the United States, was at the service of United States purposes towards Nicaragua. That is why it was created.

We have said, and amply proved, that the purpose animating United States policy was the overthrow of the present Government. That may well have been the purpose of many or even most of those in the *contra* force. But this was no mere coincidence of purposes — two actors jointly pursuing a common end. The United States called the tune and the *contra* leaders did what they were told. They became an extension of the Central Intelligence Agency — as Mr. Chamorro said, "the executioner of its orders" — and the CIA, as we have seen, is a fully subordinate arm of United States foreign policy.

Sending by or on behalf of the acting State. Here we look to evidence of external impulse and external imposition of will on the irregular forces. How can we say that the *contras* were "sent" into Nicaragua? Were they not ready and willing to go on their own? Congressman Wright, the Majority Leader of the House of Representatives, had no trouble with this point. He said: "The CIA actively recruited and trained and equipped thousands of men and sent them into Nicaragua to engage in war." (Supp. Ann. C, Attachment 5, 131 *Cong. Rec.* H4152 (12 June 1985).) An FDN leader himself commented that what the CIA chief in Honduras did was to get the *contra* commanders out of their comfortable houses in Tegucigalpa and into the field in Nicaragua (Ann. F, No. 188, p. 285).

The *contra* army was sent into Nicaragua by the United States in a much more fundamental sense. Its missions in their essential aspects were defined by the United States. Its offensives were planned by the United States. The military objectives were established by the United States. Particular targets were selected by the United States, and the command structure, as described in the testimony, was such that it is clear the CIA gave the orders to march.

Participation in acts of terrorism. It is especially painful for an American to talk about United States responsibility for the acts that have been so vividly described in the testimony. According to Professor Glennon's testimony, high United States officials told him they had knowledge of the *contra* atrocities, that "the level of atrocities was enormous", and that the United States Government maintained a posture of "intentional ignorance" (p. 77, *supra*). But this is not an abstract question of whether mere inaction in the face of knowledge is enough for liability. That is what I mean when I say that technical categories should not be allowed to obscure the realities of the case. The record in this case, unfortunately, reveals much more than mere knowledge.

It is a fundamental principle of command responsibility — written into the training manuals of all the United States armed forces, as well, I think, of most of the armed forces of the world — that the commander is affirmatively responsible for instructing his troops in the requirements of the law of war and for imposing discipline when these requirements are violated, even in occasional instances. If not, he is guilty himself, and that responsibility is transmitted to his superiors right up to the chain of command — until someone takes corrective action. Here the CIA was in the position of trainer and commander. It failed on both counts. There is no evidence that the instructors ever provided training in the law of war or ever imposed discipline for violations. On the contrary, in what may be the most shameful episode in this whole sorry affair, the CIA prepared the manual on *Psychological Operations in Guerrilla Warfare*, distributed 2,000 copies among the *contras* and conducted seminars to see that its lessons were well learned (Supp. Ann. G, para. 28; p. 17, *supra*).

Moreover, the CIA, as well as other high American officials, both in the past and today, have tried systematically to disparage the evidence and to conceal from the American people and the world the fact that the *contras* are engaging in terror tactics. Mr. Chamorro lost his job when he said truthfully, in response to a reporter's question, that atrocities were in fact being committed, although even he tried to explain them away (Supp. Ann. G, para. 29).

I am glad to say that concealment of that kind remains very difficult to achieve in the United States. The truth has been made known by a number of investigations, like that of the International Human Rights Law Group about which Professor Glennon testified. Three such reports are included in Annex I. The conclusions of all of them are substantially similar and are summarized in Supplemental Annex E, a recent report by Americas Watch, an independent non-profit organization that monitors human rights compliance in Latin America. That report is worth reading in full, but I will quote only the major conclusions:

> "With respect to the human rights practices of the *contras*, we have examined the Administration's claims for the moral character of these insurgents and find, to the contrary, that the *contras* have systematically engaged in the killing of prisoners and the unarmed, including medical and relief personnel; selective attacks on civilians and indiscriminate attacks; torture and other outrages against personal dignity; and the kidnappings and harassment of refugees. We find that the most violent abuses of human rights in Nicaragua today are being committed by the *contras*, and that the Reagan Administration's policy of support for the *contras* is, therefore, a policy clearly inimical to human rights." (Supp. Ann. E, IV, pp. 409-410.)

Fomenting and instigating. The United States financing, as Mr. Reichler showed yesterday, is the life-blood of the *contras*. They were unorganized and ineffective bands of ex-National Guardsmen before the presidential decision to undertake covert action against Nicaragua. They were, as Commander Carrión said, confined to stealing catttle in the border areas (p. 13, *supra*). They themselves were conscious of their impotence. In fact, until the CIA came along, the *contras* were incapable of anything more (pp. 13-14; Supp. Ann. G, para. 7). When the CIA entered the scene, however, Colonel Bermudez, the leader of one of these groups, who was to become the chief military commander of the *contras*, said: "I could feel the steps of a giant animal" (Ann. F, No. 88, p. 284).

The capability to mount sustained offensives or deep penetration into Nicaraguan territory that Commander Carrión described was exclusively the result of this United States presence. The ebb and flow of their offensives coincided with the rise and fall of United States financing (p. 16, *supra*).

The story of Dewey Maroni — actually Duane Clarridge the CIA manager of the operation — moving onto the scene in Tegucigalpa and making dispositions for every phase of the *contra* activities is a classic instant of instigation. He was active on all fronts: supply and armament, tactics, command systems, the organization of a "respectable" political directorate, greasing the wheels in the CIA and with Congress (Supp. Ann. G, paras. 20, 22, 26, 29). By themselves, without the impetus from Clarridge and others like Colonel North, and without the millions of dollars they brought with them, the *contras* could not have established or maintained the momentum required for the activities they did in fact undertake. Even as it was, they needed and got constant and direct reassurance — from Clarridge, Casey, North, Lehman and many others — that the President was with them and that the United States would stay the course until the present Government was finally ousted from Managua (see generally, Supp. Ann. G).

I thank the Court for its indulgence in listening again to a recital of evidence that we have heard before, this time packaged, not along the lines that Mr. Reichler and I laid out yesterday, but in relation to these headings, rubrics and formulations used by the scholars of international law.

I said at the outset that this case marks the first time the Court is called upon to speak comprehensively on Article 2 (4). The Court has not been altogether silent on the question of the use of force, however. What it has said was not in the context of a case brought under Article 2 (4). Its words are few and they were uttered almost 40 years ago. But they still resonate with the values expressed in the Charter provision. This was in the *Corfu Channel* case:

> "The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States . . ." (*I.C.J. Reports 1949*, p. 35.)

The last sentence of that passage is especially noteworthy in the present context. It shows the understanding of a Court speaking when the principles and purposes of the Charter were still fresh, that prohibitions in international law against the use of force have much to do with protection of the weak against the strong. In that case, the Court stood with a small, one might say outcast State, against one of the historic naval powers of Europe. As in *Corfu Channel*, the United States use of force here is still less admissible in the particular form it would take; for, from the nature of things it would necessarily be reserved for the most powerful States.

THE ORGANIZATION OF AMERICAN STATES CHARTER

The Application in this case also asserts that the actions of the United States are in violation of the Charter of the Organization of American States. The specific provisions in issue are Articles 20 and 21:

> "The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever . . ." (Art. 20.)
>
> "The American States bind themselves in their international relations not to have recourse to force except in the case of self-defence in accordance with existing treaties or in fulfillment thereof." (Art. 21.)

In their substantive provisions, these Articles are essentially the same as those of the United Nations Charter. The reference in Article 21 to existing treaties to define the right of self-defence is a reference to the United Nations Charter. Article 20, it can be said, is even more explicit than Article 2 (4) in proscribing "measures of force taken directly or indirectly against another State" and in limiting the purposes to zero for which such measures can be used. It follows that since, as Nicaragua has shown, the conduct of the United States violates the prohibition of Article 2 (4), it also violates the Charter of the Organization of American States.

Nevertheless, it is important to spend a few moments on the Organization of American States Charter. The reason is not that its provisions are necessarily wider than those of Article 2 (4). The reason is that the Organization of American States Charter, unlike that of the United Nations, is not a universal obligation, but one that prevails among a geographically specific group of States to which both of the Parties belong, and it reflects the painful lessons of their common history and experience. It is a separate undertaking that the United States has given to the countries of the western hemisphere and therefore has special weight in this proceeding.

The historical background against which these provisions were drafted is set forth in Nicaragua's Memorial. To summarize it in the briefest form, it consists of over a century of almost continuous United States intervention by force under claim of right in the affairs of the countries of Latin America; especially Central America and the Caribbean.

The most explicit justification for this course of conduct was the Roosevelt corollary — Theodore Roosevelt — to the Monroe Doctrine, enunciated in 1904. He said:

> "chronic wrongdoing or an impotence which results in a general loosening of the ties of civilized society may in America, as elsewhere, ultimately require intervention by some civilized nation" (6 Moore, *A Digest of International Law* 967 (1906)).

Whatever the plausibility of this pronouncement in the turn-of-the-century context in which it was uttered, it could not survive the change in the basic assumptions of international relations that has marked the past 75 years. The principal preoccupation of Latin American international legal scholarship over that period was to deny the United States claim to a rightful authority to police by force the internal or external policies or governmental arrangements of other countries in the hemisphere. And a major objective of the concerted diplomacy of Latin America in the 1920s and 1930s was to secure the renunciation of that claim.

President Franklin Roosevelt launched a new policy with his "good neighbour" policy in 1933. In a series of Pan-American conferences in the 1930s, the principles and language that were ultimately embodied in the Organization of American States Charter were hammered out and finally accepted by the United States. This development culminated in 1948 in the formation of the Organization of American States and the adoption of its Charter.

The Final Acts of the Pan-American conferences of the 1930s resulted in obligations for the United States from the standpoint of international law. But the OAS Charter was the first of the agreements renouncing the claimed right to intervene that was ratified as a treaty with the advice and consent of the Senate in accordance with the process mandated by Article II of the United States Constitution.

The conduct that the OAS Charter was designed to forbid was the very conduct and by the very State that is the Respondent in this lawsuit. The undertaking of the United States has special meaning to the countries of the Caribbean and Central America, which has been the object of repeated military occupation by United States forces. Nicaragua itself was under military occupation on and off for a century and continuously from 1909 to 1933, a period of over 20 years. The Applicant in this lawsuit, therefore, was supposed to be a particular beneficiary of the provision of the OAS Charter that it invokes.

The Multilateral Treaty Reservation

The Court decided in its Judgment on the jurisdiction of the Court and the admissibility of the Application that:

> "the objection based on the multilateral treaty reservation of the United States Declaration of Acceptance does not possess, in the circumstances of the case, an exclusively preliminary character, and that consequently it does not constitute an obstacle for the Court to entertain the proceedings . . ." (*I.C.J. Reports 1984*, pp. 425-426).

This issue need not detain us long. It was fully discussed by both parties at the jurisdictional plase and again in Nicaragua's Memorial on the merits. Nicaragua stands on its arguments made in those times and places and they need not be repeated here. The remarks on the subject in the Judgment of the Court, however, and in the separate opinions of several of the Judges have provided considerable instruction on the matter and warrant emphasis here.

In the first place, as the Court said, a State making a reservation to its declaration under the optional clause will not be acting for the benefit of third parties. This is especially true as to third parties that have themselves accepted the compulsory jurisdiction of the Court and so are in a position to protect their own interests, either by intervention or by the initiation of separate proceedings against the applicant. Judge Ruda said:

> "it does not seem logical that a State submitting a declaration accepting the compulsory jurisdiction of the Court, but excluding certain matters affecting its own interests from that jurisdiction, should act on behalf of third States" (*I.C.J. Reports 1984*, p. 456).

His review of the legislation history of the multilateral treaty reservation demonstrates that it is fully in accord with that conclusion and it is not necessary to recapitulate that review here.

Nicaragua would also recall the Court's observation that El Salvador, Honduras and Costa Rica, the States said to be affected by the Judgment have all

> "made declarations of acceptance of the compulsory jurisdiction of the Court and are free, at any time, to come before the Court, on the basis of Article 36, paragraph 2, with an application instituting proceedings against Nicaragua . . . Moreover, these States are also free to resort to the incidental procedures of intervention under Articles 62 and 63 of the Statute" (*I.C.J. Reports 1984*, p. 425).

This consideration is especially weighty in the present phase of the case. El Salvador, the State said to be chiefly concerned, filed a declaration of intervention in the jurisdictional phase. The application was denied as premature, but the Court was careful to preserve El Salvador's rights to intervene on the merits. We have now reached the end of the merits phase, and El Salvador has yet to appear, although it found itself fully capable of defining its own interests and acting to protect them in the earlier phase.

The proviso is not designed to protect third parties. It was meant to protect the interests of the United States. What these might be Judge Ruda has also defined with clarity. The problem envisaged is that in a case arising under a multilateral treaty, the United States, as defendant, might be bound by a judgment to a certain course of action when other parties to the same treaty who were not parties to the case would be able to pursue that very course of action to the detriment of the United States. For example, in a dispute between the United States and another party to a multilateral fisheries agreement, the judgment might establish limits on the catch to which the United States was entitled. But these limitations would not apply by operation of the judgment to other parties to the agreement that were not before the Court. They would remain "juridically free", in Judge Ruda's words (*I.C.J. Reports 1984*, p. 456), to fish in disregard of the limitations expressed in the Judgment. Finally, and most important, with the record now closed it can be seen clearly that the Judgment cannot affect third parties. What has been revealed is a use of force in blatant violation of international law. No third State can have a right to its continuance.

ARTICLE 51

Nicaragua has already adverted both in its Memorial and its oral pleadings to the difficulty in which it is placed in regard to the issue of self-defence by virtue of the provisions of Article 53. But in the present posture of the case, these difficulties are more theoretical than real. Nicaragua submits that the Court can dispose of the issue — to its entire satisfaction — on any one of three grounds.

1. As a factual matter, there has been no "armed attack" against El Salvador or any other State in the region within the meaning of Article 51. Even under the so-called "non-restrictive" view of the scope of the inherent right of self-defence, the facts show no use of force nor any other kind of physical threat by Nicaragua to its neighbours.
2. Even on the counter-factual assumption that there were such a threat, the response of the United States does not meet the requirements of necessity and proportionality that are universally agreed to be limitations on the right.
3. The purpose of the United States actions is to overthrow the Government of Nicaragua and that purpose is fundamentally inconsistent with the inherent right of self-defence.

I want to say only a few words on each of these points.

(1) *Armed attack.* Nicaragua produced concrete and credible evidence all of which shows that it was not supplying arms to El Salvador either now or in the relevant past (pp. 31, 32, 37-38, *supra*; Ann. B). The Court cannot, I believe, dismiss this evidence on the basis of newspaper reports or generalities issuing from the United States State Department or the White House. In questioning from the Bench, the allegations in El Salvador's Declaration of Intervention were referred to. The short answer to those allegations is that El Salvador, like the United States, had every opportunity to appear in these proceedings and submit proof of its allegations. Indeed, the Court's Order on the Declaration in effect invites it to do so.

Whatever Article 53 means, it is not a licence to speculate. Neither is it a means by which the Respondent, by staying out of Court, can shift the burden of proof to the Applicant on issues that are properly matters of affirmative defence.

(2) *Proportionality.* Whatever their views on the occasions when self-defence is permitted under international law, all the publicists agree that the scope of the right is limited by the magnitude of the threat. What is the threat alleged in this case? That Nicaragua is providing the guerrillas in El Salvador with arms and supplies and some other limited forms of support. If collective self-defence is legally warranted against such action, there is certainly a great deal of room to meet it without using force against Nicaragua. It is simply incredible that the resources of the United States, Honduras and El Salvador combined are insufficient to prevent a significant flow of arms from reaching El Salvador from Nicaragua, with which it has no common land frontier.

Judge Schwebel suggested in questions to a witness that the reason there has been no supply of arms is that the military and paramilitary activities undertaken by the United States and the *contras* have induced Nicaragua to stop it. The United States, he suggested, has demonstrated that:

> "a policy of sending arms to insurgents in El Salvador had a price, and they feared it might have an even greater price, and therefore they stopped sending arms, if indeed they did" (p. 62, *supra*).

The difficulty with that suggestion is that the price that can be exacted is limited by international law — in this case by Articles 2 (4) and 51 themselves. Article 51 confines the defender to what is needed to repel the "armed attack" against it, however those words are construed — and nothing more. Those limits do not permit a four-year campaign of armed depredations by a large well-organized army attacking the vital functions deep in the target country and including widespread use of terror and indiscriminate attacks on civilians. That price is simply too high to be permitted to be charged in a world governed by law.

(3) *The purpose to overthrow the Government of Nicaragua.* I spent some time yesterday demonstrating the purpose of the United States policy and actions involved in this case as established in the evidence before the Court. I understand that Professor Brownlie has done the same thing this morning. I do not propose to repeat the performance a third time. I take it as conclusively established that the purpose is to overthrow the Government of Nicaragua or, in President Reagan's words, "remove it from office" (Ann. C, Attachments 1-14).

Such a purpose is fundamentally inconsistent with a claim of self-defence. Article 2 (4) is not only designed as a comprehensive prohibition on the use of force, subject to the single narrow exception of Article 51. Article 2 (4) specifically protects the political independence or territorial integrity of the State from invasion by force of arms. To permit the United States, in the circumstances of this case, to justify its conduct under the rubric of self-defence would be to let the exception swallow the rule.

Mr. President, Members of the Court, my role in the presentation of Nicaragua's case to the Court is almost done. I am deeply conscious of the burden I leave with you. We have discussed some of the authorities on the use of force under Article 2 (4) in this oral pleading, and we have cited many more in our Memorial. Yet, I have the sense that we have not seen the whole picture. When I look at the whole range of public discourse in the United States and elsewhere on the use of force in international relations, I am disconcerted. In my own country, even some of my own younger colleagues, the next generation of scholars of international law, seem ready to give up the long struggle to outlaw the use of force as an instrument of national policy — the ideal that gave birth to Article 2 (4).

A recent note in the *American Journal of International Law* by Professor Michael Reisman of Yale Law School says that "Article 2 (4) was part and parcel of a complex collective security process". The collapse of that process, he argues, has undermined the original understanding of the Article. Thus, he says, the use of force must be regarded as permissible when it is applied in support of community order and basic policies — presumably as determined by the State that is using force.

In the same issue of that *Journal*, Professor Anthony d'Amato, in a discussion of this very case, puts forward the suggestion that the use of force is permissible under Article 2 (4) to redress flagrant violations of fundamental human rights — again, presumably, as determined by the user of force.

Almost 15 years ago, Professor Thomas Franck of the New York University Law School wrote an article entitled "The Strange Death of Article 2 (4)". One of the basic causes identified for this unhappy demise is that in situations like the one presented in this case, each great power can exercise its right to come to the collective self-defence of the side it prefers.

I am by nature an optimist, however, and I am not yet ready to join my colleagues in returning to a Hobbesian international community. I believe the returns are not yet all in on the death of Article 2 (4). In particular, this Court has not yet been heard from.

All of the articles noted above mention as a central defect in the regime of Article 2 (4) the absence of an institutional process for determining authoritatively what is a prohibited use of force under that Article and what is a valid exercise of the right of self-defence under Article 51. In this case there is such an institutional process.

When Nicaragua brought its case to the Court, it was of course seeking an adjudication of its rights under international law. But is was doing more than that. It was attesting its commitment to live by the law as the Court pronounces it.

The Court, as we are all told many times, has no coercive power to enforce its decisions. It has on its side only the moral authority of the law. But in the end, its most important role, as one of our great judges said, is as teacher to the citizenry — in this instance, the citizenry of the world. The Court in this case has the opportunity to revive the original understanding of the Charter, and its message that law and not force is to resolve disputes among nations large and small. If in this case, in this Court, the citizenry of the world can see justice done and hear it spoken, we need not worry about the death of Article 2 (4).

The Court adjourned from 4.15 to 4.25 p.m.

PLAIDOIRIE DE M. PELLET

CONSEIL DU GOUVERNEMENT DU NICARAGUA

M. PELLET : Monsieur le Président, Messieurs de la Cour, c'est un grand honneur pour moi de me présenter de nouveau devant vous et j'espère que je saurai me montrer digne de votre confiance.

Mon exposé se décomposera en deux parties bien distinctes, et bien que je sois amené à les présenter à la suite l'une de l'autre, il serait sans doute plus exact de parler de deux plaidoiries différentes que d'un exposé unique.

Dans un premier temps, je m'efforcerai de présenter les violations du traité d'amitié, de commerce et de navigation du 21 janvier 1956, commises par les Etats-Unis.

Mon second exposé, qui sera plus succinct, portera sur les atteintes portées par les Etats-Unis au principe fondamental de la non-intervention dans les affaires intérieures d'un Etat.

Avant d'aborder le premier point, Monsieur le Président, je vous prie de bien vouloir m'autoriser à ouvrir une parenthèse en forme de note de bas de page. Mais je suis convaincu que cette « footnote » sera source de moins de difficultés qu'une autre note de bas de page qui figurait dans un certain *Annuaire* et dont on a déjà beaucoup parlé. Dans le texte de cet exposé qui a été communiqué aux interprètes, j'ai indiqué avec précision les références exactes des citations ou des allusions à la jurisprudence que je serai conduit à faire. Par conséquent, Monsieur le Président, si cette suggestion pouvait recevoir votre agrément, je souhaiterais éviter d'alourdir mon exposé oral en citant ces références et je demanderais aux fonctionnaires du Greffe, dont je sais l'efficacité souriante, de bien vouloir les rétablir dans le compte rendu écrit des audiences.

LES VIOLATIONS PAR LES ETATS-UNIS DU TRAITÉ D'AMITIÉ, DE COMMERCE ET DE NAVIGATION DU 21 JANVIER 1956

1. Comme je l'ai précisé il y a un instant, il m'appartient d'examiner les violations, commises par les Etats-Unis, du traité d'amitié, de commerce et de navigation conclu le 21 janvier 1956 entre ce pays et le Nicaragua.

Avant d'en arriver aux violations imputables aux Etats-Unis, il paraît nécessaire de revenir très brièvement sur les problèmes qui sont posés par cet instrument en tant que base des compétences de la Cour et sur les obstacles juridiques qui pourraient éventuellement s'opposer à son application.

a) *Une base de compétence valide*

Il paraît peu douteux que le traité de 1956 constitue une base de compétence valide.

2. Dans son arrêt du 26 novembre 1984, la Cour a soigneusement examiné les objections développées à cet égard par les Etats-Unis, et a conclu :

> « que, dans la mesure où les demandes formulées dans la requête du Nicaragua révèlent l'existence d'un différend sur l'interprétation ou l'application des articles du traité de 1956 ..., la Cour a compétence pour en connaître en vertu de ce traité » (*C.I.J. Recueil 1984*, p. 429, para. 83).

3. La cause paraît être entendue, mais il faut relever que, par une note non datée, remise à l'ambassade du Nicaragua à Washington le 1er mai dernier, le département d'Etat a notifié son intention de dénoncer ce traité d'amitié, de commerce et de navigation conformément aux dispositions de l'article XXV, paragraphe 3, de celui-ci. Avec votre permission, Monsieur le Président, je reviendrai un peu plus tard sur les motifs de cette dénonciation.

Le seul point qui importe au stade où je me trouve est que le paragraphe 3 de l'article XXV, sur le fondement duquel les Etats-Unis se sont fondés pour dénoncer le traité, dispose :

> « 3. Chacune des Parties pourra mettre fin au présent traité à l'expiration de la période initiale de dix ans, ou à tout moment après l'expiration de cette période, en donnant par écrit à l'autre Partie un préavis d'un an. »

Cela signifie que le traité reste en vigueur aussi longtemps que ce préavis d'un an ne sera pas écoulé, c'est-à-dire jusqu'au 1er mai 1986, et je pense que cette constatation ne suppose pas une très longue démonstration puisque les Etats-Unis eux-mêmes, dans la note non datée dont je viens de parler, semblent reconnaître qu'il en est bien ainsi. Cette note a été remise au Greffe il y a quelques jours (annexe suppl. K).

Le traité d'amitié, de commerce et de navigation du 21 janvier 1956 constitue donc bien un titre de compétence toujours valable.

b) *L'absence de toute circonstance excluant l'illicéité*

4. Mais il est vrai qu'il ne suffit pas que la compétence de la Cour soit établie sur le fondement du traité de 1956, ce qu'elle a déjà reconnu, pour que les violations de ce traité engagent la responsabilité des Etats-Unis. Puisque nous parlons de responsabilité, une condition supplémentaire doit être remplie : l'absence de toute « circonstance excluant l'illicéité », pour reprendre l'heureuse expression utilisée par la Commission du droit international dans son projet d'article sur la responsabilité des Etats pour faits internationalement illicites.

Durant la phase précédente, les Etats-Unis ont invoqué — ou semblaient invoquer — deux circonstances de ce type, dont on peut dire pour simplifier que la base juridique est distincte, mais dont la consistance est, somme toute, extrêmement voisine. D'une part, les Etats-Unis d'Amérique ont fait valoir l'excuse de légitime défense ; d'autre part, ils ont évoqué les alinéas *c)* et *d)* de l'article XXI, paragraphe 1, du traité de 1956 lui-même.

5. Ces clauses ne sauraient, en la présente occurrence, exonérer les Etats-Unis de la responsabilité qu'ils encourent du fait de leur violation du traité.

J'évoquerai les questions liées à l'alinéa *c)* dans le corps même de mon exposé, et, en ce qui concerne l'alinéa *d)*, je rappelle qu'il dispose :

> « 1. Le présent traité ne fera pas obstacle à l'application de mesures :
>
> *d)* nécessaires à l'exécution des obligations de l'une ou l'autre Partie relatives au maintien ou au rétablissement de la paix et de la sécurité internationales ou à la protection des intérêts vitaux de cette Partie en ce qui concerne sa sécurité. »

6. La première partie de cette clause, relative aux exécutions des obligations des Parties en ce qui concerne le maintien ou le rétablissement de la paix et de la sécurité, renvoie en fait aux obligations qui sont assumées par le Nicaragua et par les Etats-Unis en vertu de la Charte des Nations Unies et sans doute de celle de l'Organisation des Etats américains. Et, comme vient de le montrer M. Chayes,

ces instruments ne fournissent aucune espèce de fondement juridique aux actes et aux comportements des Etats-Unis. Par conséquent, il n'est pas nécessaire de s'y appesantir, pas plus d'ailleurs que sur l'excuse générale de légitime défense puisque la question a déjà été abordée au nom du Nicaragua par MM. Brownlie et Chayes, et avec plus de talent et d'autorité que je n'en ai.

J'ajouterai seulement que c'est, à vrai dire, prendre le problème à l'envers ; ce n'est pas parce que la paix et la sécurité internationales sont menacées que les Etats-Unis ne se conforment pas aux dispositions du traité de 1956 ; c'est au contraire parce qu'ils ne respectent pas les obligations énoncées dans le traité — qui sont aussi des obligations résultant de règles coutumières — que la paix et la sécurité internationales sont menacées, et il ne faut pas inverser l'ordre des choses.

7. Quant à l'excuse tirée des nécessités liées à « la protection des intérêts vitaux » des Etats-Unis en ce qui concerne leur sécurité, c'est-à-dire fondée sur la fin de l'alinéa *d)*, paragraphe 1, de l'article 21 de notre traité, donc à l'excuse tirée des nécessités liées à la protection des intérêts vitaux des Etats-Unis, en ce qui concerne leur sécurité, elle renvoie à la circonstance excluant l'illicéité des faits internationaux généralement désignés comme étant l'« état de nécessité » dont M. Ago rappelait devant la Commission du droit international qu'il ne constitue une excuse admissible « que si cette excuse a un caractère absolument exceptionnel » (*Annuaire de la Commission du droit international*, 1980, t. I, p. 144). Il ajoutait :

> « La menace qui pèse sur l'intérêt qu'on prétend sauvegarder doit être extrêmement grave et actuelle, et sa survenance doit être indépendante de la volonté de l'Etat qui invoque l'excuse de nécessité. » (*Ibid.*, p. 146.)

La Commission du droit international a à cet égard pleinement fait siennes les vues de son rapporteur spécial et, commentant l'article 33 de son projet d'articles consacré à la reponsabilité internationale, la Commission note :

> « La nécessité dont on parle est alors une nécessité d'Etat : la situation de péril extrême que l'on avance (...) est représentée par (...) un danger grave pour l'existence de l'Etat lui-même, pour sa survie politique ou économique, pour le maintien de possibilité de fonctionnement de ses services essentiels, pour la conservation de sa paix intérieure, pour la survie d'une partie de sa population, pour la conservation écologique de son territoire, etc. » (*Annuaire de la Commission du droit international*, 1980, t. II, deuxième partie, p. 34.)

Sauf à entrer dans de longues discussions, il est toujours difficile d'administrer une preuve négative ; mais, en l'espèce, je ne pense pas m'aventurer beaucoup en affirmant que rien dans la présente situation ne s'apparente, de près ou de loin, avec les cas extrêmes mentionnés par la Commission sauf peut-être pour le Nicaragua, mais certainement pas si ces cas extrêmes sont vus du côté des Etats-Unis. Comme le Nicaragua l'a montré dans son mémoire, c'est à la Cour qu'il appartient d'apprécier les assertions des Etats-Unis sur ce point. Mais il paraît plus qu'hasardeux, Monsieur le Président, de soutenir que la seule présence d'un gouvernement dont les choix politiques, économiques et sociaux déplaisent aux Etats-Unis, ceci dans un petit pays d'Amérique latine n'ayant aucune frontière commune avec les Etats-Unis, peut menacer, d'une manière quelconque, les « intérêts vitaux des Etats-Unis en ce qui concerne [leur] sécurité ».

8. L'invocation par les Etats-Unis d'Amérique, de ces diverses circonstances excluant l'illicéité appelle en outre une dernière remarque.

On peut transposer ici le raisonnement que mon savant collègue, M. Brownlie, a développé ce matin devant vous, s'agissant de la seule légitime défense

Du seul fait que les Etats-Unis ont invoqué les dispositions des alinéas *c)* et *d)* de l'article 21 du traité de 1956, de ce seul fait, les Etats-Unis admettent, implicitement certes mais nécessairement, qu'ils livrent « des armes, des munitions et du matériel de guerre » à ce qu'ils considèrent comme étant des unités militaires — ceci concerne l'alinéa *c)* — et, les Etats-Unis admettent aussi, plus généralement, qu'ils ne respectent pas les dispositions du traité, au prétexte, soit qu'ils ne peuvent en concilier le respect avec leurs obligations « relatives au maintien ou au rétablissement de la paix et de la sécurité internationales », soit que leurs intérêts vitaux sont menacés — et ceci concerne l'alinéa *d)*. Or nous avons vu que ni l'un ni l'autre de ces prétextes ne sont fondés.

c) *Une contre-épreuve riche d'enseignements*

9. Ainsi, Monsieur le Président, aucune circonstance n'est, dans la présente affaire, susceptible d'effacer le caractère illicite des violations du traité de 1956, qui constitue une convention internationale toujours valable entre les Parties, et ces violations constituent — j'essaierai de le montrer — des faits internationalement illicites engageant la responsabilité des Etats-Unis.

Une précision cependant est ici nécessaire à titre liminaire : plus une règle est bien établie, plus les sources mêmes de cette règle sont nombreuses et concordantes. Or dans cette affaire, Monsieur le Président, les manquements imputés aux Etats-Unis constituent autant de violations de principes tout à fait fondamentaux du droit international, et on ne peut, dès lors, s'étonner que ces principes soient consacrés par des sources nombreuses de natures diverses, par des coutumes, par des traités multilatéraux ou bilatéraux, et sans doute même par des principes généraux de droit.

Dans la présente affaire en effet, la confrontation systématique des faits et des comportements reprochés aux Etats-Unis par le Nicaragua aux diverses dispositions du traité du 21 janvier 1956 conduit à des conclusions tout à fait identiques à celles que l'on peut faire en prenant en considération les chartes des Nations Unies ou de l'Organisation des Etats américains et les principes du droit international coutumier. En d'autres termes, les dommages subis par le Nicaragua, du fait des activités militaires et paramilitaires des Etats-Unis, ou menées à leur instigation, trouvent leur origine aussi bien dans le non-respect par ce pays de la Charte des Nations Unies, de la charte de l'Organisation des Etats américains, ou dans la violation des obligations imposées par des normes coutumières, ou encore, dans le manquement aux obligations particulières qu'ils ont acceptées par le traité d'amitié, de commerce et de navigation de 1956.

10. Ce que je veux dire, Monsieur le Président, c'est que la confrontation à laquelle je vais procéder dans un instant recoupe inévitablement très largement les exposés qui ont été ou qui vont être présentés, par ailleurs, au nom du Nicaragua. Cependant, comme l'a relevé M. Ago, dans son opinion individuelle jointe à l'arrêt du 26 novembre 1984 (*C.I.J. Recueil 1984*, p. 531-532), le traité de 1956, s'il ne permet guère de grands développements sur le plan des principes — encore qu'il en permette sans doute quelques-uns — a le mérite d'obliger à la rigueur ; il me semble que M. le président Singh et MM. Oda et sir Robert Jennings partagent au fond ce sentiment (*ibid.*, p. 446, 472 et 557).

Parce qu'il s'agit d'un traité bilatéral, d'un texte écrit, manifestant un accord de volonté des parties, il permet à celles-ci de confronter, de manière précise, les faits à ses diverses dispositions, en même temps qu'il les y oblige ; le décalage entre les uns — les faits — et les autres — le droit — constituant manifestement des faits internationalement illicites ouvrant droit à réparation.

Cela veut dire, Monsieur le Président, que des grands principes que mon collègue Abram Chayes a magistralement présentés devant vous il y a quelques instants, il faut passer à un examen plus austère de règles plus techniques. L'analyse y gagnera peut-être en précision, elle y perdra certainement en émotion et sans doute en force de conviction.

11. Et cependant, même avec la volonté d'être précis, il ne serait pas légitime de procéder à cette confrontation article par article sans avoir, auparavant, pris en considération le traité de 1956 dans son ensemble. Car il apparaît que si les Etats-Unis ont violé de nombreuses dispositions précises de cet accord, ils l'ont aussi, et peut-être surtout, vidé globalement de toute substance, de toute signification et de toute portée.

Je m'efforcerai donc d'établir, dans un premier temps, que les Etats-Unis d'Amérique ont privé le traité d'amitié, de commerce et de navigation du 21 janvier 1956 de son objet et de son but et, dans un second temps, qu'ils n'ont, en outre, pas respecté les obligations particulières qui leur incombent en vertu d'un grand nombre des dispositions de ce traité.

I. Les Etats-Unis ont privé le traité de 1956 de son objet et de son but

12. Dans le mémoire qu'il a remis à la Cour le 30 avril dernier, le Nicaragua a consacré d'assez longs développements en vue d'établir la portée exacte du traité d'amitié, de commerce et de navigation du 21 janvier 1956. Je ne voudrais pas abuser de la patience de la Cour en reprenant le détail de cette argumentation. Il semble cependant nécessaire d'en rappeler les grandes lignes et de préciser certains points avant de montrer que les Etats-Unis ont, par leur comportement général, vidé le traité de sa substance même, ce qui en soi constitue une violation de ce traité, un manquement à une obligation juridiquement consacrée.

A. Le traité de 1956 a une portée générale

13. Sans doute, ainsi que l'a relevé la Cour au paragraphe 47 de son arrêt sur la compétence et la recevabilité de la requête, cet accord constitue « à première vue » une base de compétence « plus étroite dans sa portée que la compétence résultant des déclarations faites par les deux Parties en vertu de la clause facultative » (*C.I.J. Recueil 1984*, p. 426). Et il est vrai que, en apparence au moins, le champ d'application du traité de 1956 est plus limité que celui couvert par la requête du 9 avril 1984.

Cette première impression, et la Cour dit bien qu'il s'agit d'une réaction « à première vue », doit cependant être nuancée.

En effet si, à certains égards — limités on le verra —, la base de compétence constituée par le traité est plus étroite que celle résultant des déclarations des Parties en vertu de l'article 36, paragraphe 2, du Statut, cet accord peut, comme le soulignait M. Ago :

> « se montrer à l'application beaucoup plus à même qu'on ne le pense, d'englober dans son cadre, non pas complètement si l'on veut, mais peut-être sous une forme plus rigoureuse et mieux définie, les questions litigieuses qui opposent les Parties » (*C.I.J. Recueil 1984*, p. 531-532).

Le traité du 21 janvier 1956 recouvre en effet la plus grande partie des problèmes soulevés par la requête du Nicaragua. D'une part, s'il est un traité de commerce, il l'est au sens le plus large du terme et nombre de griefs articulés par le Nicaragua tiennent précisément aux violations par les Etats-Unis de ce que l'on pourrait appeler le *jus communicationis* garanti par l'accord de 1956. D'autre part, ce traité est aussi un traité d'amitié, au sens plein de l'expression et c'est bien le comportement, pour le moins inamical des Etats-Unis à l'égard du Nicaragua, qui est en cause. Enfin, il apparaît que le traité de 1956 doit être lu comme un tout et que les dispositions « commerciales » et les « clauses d'amitié » qu'il contient sont étroitement interdépendantes.

Je me propose de revenir de manière un peu plus détaillée sur chacun de ces trois points.

a) *Un traité de commerce au sens le plus large du terme*

14. Dans leur contre-mémoire relatif aux exceptions préliminaires, les Etats-Unis ont contesté la pertinence du traité du 21 janvier 1956 au motif du « caractère commercial de cet instrument » (p. 108).

Le Nicaragua ne conteste nullement que cet accord soit, entre autres choses mais très évidemment *aussi*, un traité de commerce. Mais, s'il est commercial, il l'est au sens le plus large du terme.

Il n'est pas sans intérêt de relever à cet égard que le seul auteur que les Etats-Unis aient cité dans leur contre-mémoire du 17 août 1984, page 408, M. Hermann Walker, est en plein accord avec cette analyse. Il écrit par exemple, et ceci dans le passage qu'ont cité les Etats-Unis :

> « They [il s'agit des traités d'amitié, de commerce et de navigation] are "commercial" *in the broadest sense of the term.* » (« Modern Treaties of FCN », *Minnesota Law Review*, 1958, p. 806 ; voir aussi p. 805 et 822.)

Elargissant ses perspectives, le même auteur précise dans une autre étude, publiée elle-aussi en 1958, l'année même où le traité conclu entre les Etats-Unis et le Nicaragua est entré en vigueur :

> « They [ce sont toujours les traités d'amitié, de commerce et de navigation] are designed to establish the ground rules regulating economic intercourse in the broad sense, and they accordingly must reflect a meeting of minds regarding proper international standards of behavior on a variety of subject matters. » (Hermann Walker Jr., « The Post-War Commercial Treaty Program of the United States », *Political Science Quarterly*, 1958, p. 57.)

Ces vues sont confirmées par la doctrine et la jurisprudence américaines elles-mêmes, dont le Nicaragua a reproduit des extraits significatifs dans son mémoire (voir notamment **IV**, p. 101 et 111).

15. A la différence des accords de commerce *stricto sensu*, des « reciprocal trade agreements » — comme les Etats-Unis en ont conclu par ailleurs —, notre traité concerne, bien sûr, l'achat de biens et de services, mais aussi, et à vrai dire davantage, l'établissement et la protection des personnes, individus comme sociétés, les investissements, les relations monétaires et financières, les transports et, en particulier, la navigation, les assurances, ou même les échanges culturels et les activités philanthropiques.

De tous ces éléments, du préambule du traité, de son contenu — qui couvre un champ extrêmement vaste —, de sa structure — il est si l'on peut dire « construit en U » et part de considérations très générales, puis il précise certains points avant de revenir à des principes de vaste portée —, de tout cela on peut dire que les dispositions « commerciales » du traité d'amitié, de commerce et de navigation de 1956 correspondent à la définition la plus large du « commerce international » donnée par le *Dictionnaire de la terminologie du droit international*, établi sous la direction du président Jules Basdevant. Il y est dit que le mot « commerce » est un :

> « terme employé parfois pour distinguer l'ensemble des rapports écono-

> miques, politiques, intellectuels entre Etats et entre leurs ressortissants » (Sirey, Paris, 1960, p. 126).

Ainsi, il apparaît que ce traité de 1956, s'il est « de commerce », l'est au sens le plus large du terme et que c'est un véritable *jus communicationis* qu'il entend promouvoir — et pas seulement le commerce, traduction du mot anglais *trade*.

b) *Un traité d'amitié au sens plein du terme*

16. Cette constatation n'exclut aucunement que le traité du 21 janvier 1956 soit aussi un traité d'amitié.

En effet, qu'un traité contienne des clauses commerciales est une chose ; qu'il soit, pour autant, de nature exclusivement commerciale en est une autre bien différente. Et, en l'espèce, ce n'est certainement pas le cas du traité conclu il y a près de trente ans entre le Nicaragua et les Etats-Unis.

Cela est attesté d'abord par son intitulé même — il n'est pas besoin d'insister : c'est un traité *d'amitié*, de commerce et de navigation —, par son préambule, par nombre de ses dispositions, et par l'esprit dans lequel il a été conclu et appliqué. Ceci, Monsieur le Président, a été développé dans le mémoire du Nicaragua ; je n'insisterai que sur des points sur lesquels le mémoire a été relativement rapide.

17. Le préambule énonce l'objectif du traité et indique, on ne peut plus clairement, qu'il s'agit de « resserrer les liens de paix et d'amitié qui unissent traditionnellement les deux pays ». Il n'est ni nécessaire, ni sans doute souhaitable, d'entrer ici dans la querelle doctrinale, tout à fait passionnante, mais assez abstraite, de savoir si les termes utilisés dans le préambule d'un accord international ont, par eux-mêmes, une valeur obligatoire. Il suffit de rappeler que, codifiant ce qui est, sans hésitation possible, le droit coutumier minimum, l'article 31 de la convention de Vienne sur le droit des traités fait du préambule un élément du contexte à la lumière duquel doivent être interprétées les diverses dispositions du traité.

Cette position qui reflète la jurisprudence constante de la Cour, que le Nicaragua a rappelée dans son mémoire (**IV**, p. 104-105), est approuvée par une doctrine qui paraît tout à fait unanime.

Cela signifie que même si le préambule de 1956 ne crée pas de droits subjectifs en faveur du Nicaragua, il convient de lire le traité à la lumière du préambule et non pas comme les Etats-Unis ont essayé de le faire dans leur contre-mémoire sur les exceptions préliminaires (**II**, p. 53), d'interpréter le préambule à la lumière des autres dispositions du traité.

De même que la Cour permanente de Justice internationale s'est fondée sur le préambule de la partie **XIII** du traité de Versailles pour en affirmer « le caractère compréhensif » (*Compétence de l'OIT pour la réglementation internationale des conditions du travail des personnes employées dans l'agriculture, avis consultatif, 1922, C.P.J.I. série B n° 2*, et *Compétence de l'OIT pour l'examen de propositions tendant à organiser et à développer les moyens de production agricole, avis consultatif, 1922, C.P.J.I. série B n° 3*, p. 25), de même la lecture du préambule du traité d'amitié, de commerce et de navigation du 21 janvier 1956 montre, sans aucun doute, que les Etats-Unis et le Nicaragua ont entendu conférer à ce traité la plus vaste portée et ne pas en limiter l'objet à la réglementation de leurs relations commerciales.

Il en résulte au moins deux conséquences :

1) si certaines clauses peuvent être interprétées aussi bien de manière étroitement commerciale que de façon plus large, c'est la seconde méthode qui doit

prévaloir, car tout raisonnement inverse serait contraire à l'intention clairement exprimée par les parties dans le préambule ; et

ii) autant il est légitime de donner leur plein effet aux dispositions de nature commerciale figurant dans le traité, autant il ne saurait y avoir la moindre raison de priver d'effet juridique les dispositions du traité qui n'ont pas de portée commerciale.

18. Indépendamment même des considérations tirées du préambule, cette conclusion s'impose du seul fait que l'on ne saurait présumer que des dispositions qui figurent dans un accord international sont dénuées de toute signification et de tout effet.

Comme l'avait rappelé avec une grande fermeté la commission des réclamations anglo-américaines en 1926, dans l'affaire des *Indiens Cayuga*

> « nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than to deprive it of meaning » (British-American Claims Commission (président Nerincx, *AJIL*, 1926, p. 587)),

et la jurisprudence de la Cour permanente d'arbitrage, par exemple dans l'affaire des *Pêcheries de l'Atlantique Nord* (*RSA*, XI, p. 198), ou celle de la Cour, par exemple dans les arrêts relatifs aux *Emprunts serbes, arrêt nº 14, 1929, C.P.J.I. série A nº 20*, et aux *Emprunts brésiliens, arrêt nº 15, 1929, C.P.J.I. série A nº 21*, page 32, ou au *Détroit de Corfou, fond, arrêt, C.I.J. Recueil 1949*, page 24, confirme en tous points cette règle d'interprétation.

Or, une lecture purement commerciale de très nombreux articles du traité de 1956 priverait ces articles de toute portée, et priverait même ces articles de sens. Dans son mémoire (**IV**, p. 101-102) le Nicaragua a cité quelques-unes de ces dispositions qui n'ont rien de commercial. Par exemple, c'est le cas de l'article II, paragraphes 2 et 3 ; de l'article III ; de l'article V, paragraphe 1 ; de l'article XI, paragraphe 2. Cette énumération n'est pas limitative ; on peut y ajouter, par exemple, l'article IV qui impose un certain nombre de règles fondamentales en matière de protection sociale ; ou bien l'article X, paragraphe 2, qui pose des principes très généraux en matière de coopération scientifique et technique ; ou encore l'article XXI, paragraphe 1, alinéas *c*) et *d*), sur lequel je reviendrai, mais je pense qu'il faut noter dès maintenant qu'en réservant le cas du commerce des armes et des mesures « nécessaires à l'exécution des obligations des parties relatives au maintien ou au rétablissement de la paix et de la sécurité internationales », les deux parties ont manifesté, pour le moins, que les préoccupations liées à leur sécurité n'étaient pas absentes de leur esprit lorsqu'elles ont conclu leur accord.

D'autres dispositions peuvent avoir un sens, aussi bien si elles sont interprétées dans une perspective purement commerciale que comme des clauses d'amitié. Mais, si on ne les interprète que comme des clauses commerciales, elles s'en trouvent considérablement édulcorées et rien dans le traité ne le justifie. Tel est le cas surtout de l'article premier, sur lequel j'aurai l'occasion d'insister demain. Cette disposition qui est placée en tête du traité impose aux parties une obligation de comportement extrêmement générale et que l'on ne saurait certainement limiter abusivement au domaine du commerce, puisqu'elle impose à chaque partie d'accorder aux nationaux de l'autre partie, un traitement équitable.

19. Ceci est du reste confirmé par la pratique des traités d'amitié, de commerce et de navigation.

Monsieur le Président, il y aurait quelque outrecuidance de ma part à rappeler longuement à la Cour qu'elle a eu, à trois reprises, si je ne me trompe pas, à connaître de problèmes liés à l'application de tels traités. Dans l'affaire relative aux *Droits des ressortissants des Etats-Unis d'Amérique au Maroc*, ce sont bien les clauses commerciales du traité conclu entre les Etats-Unis et l'Empire chérifien de 1836 qui étaient en litige ; en revanche, les dispositions du traité de 1937 entre la France et le Siam, qu'elle a eu à appliquer dans l'affaire du *Temple de Préah Vihéar*, et les dispositions du traité de 1955 entre les Etats-Unis et l'Iran, qui étaient en cause dans l'affaire du *Personnel diplomatique et consulaire des Etats-Unis à Téhéran*, étaient typiquement des clauses non commerciales, et qui n'avaient rien à voir avec le commerce, même au sens large d'ailleurs. Au surplus, dans ce dernier cas, la disposition invoquée par les Etats-Unis était rédigée de manière analogue à l'article III, paragraphe 1, du traité de 1956 entre le Nicaragua et les Etats-Unis.

Le Nicaragua a développé longuement ce point dans son mémoire (p. 209 et suiv.) et il a montré également que la pratique interne des Etats-Unis donne leur plein effet aux clauses non commerciales de tels traités — il me semble donc tout à fait inutile d'y revenir à cette barre.

Tous ces éléments qui se renforcent mutuellement, concourent nettement à la même conclusion : les mots et expressions « paix », « amitié », « traitement équitable », « relations amicales », « protection et sécurité les plus constantes », qui, parmi d'autres, figurent dans plusieurs dispositions du traité qui n'ont pas (ou pas seulement selon le cas) d'implications commerciales. Toutes ces dispositions, toutes ces expressions, ont un sens « ordinaire » et doivent produire le plein effet que la définition habituelle qui leur est donnée implique. Cela découle de la « règle générale d'interprétation » codifiée par l'article 31 de la convention de Vienne sur le droit des traités et dont il est là encore assez longuement fait mention dans le mémoire du Nicaragua.

c) *L'interdépendance des dispositions du traité*

20. Monsieur le Président, la présentation générale du traité de 1956, que j'ai faite jusqu'à présent, risque de donner l'impression erronnée que cet instrument peut être, en quelque sorte, « coupé en tranches », que l'on peut isoler des dispositions commerciales d'une part, et les clauses d'amitié d'autre part, et que le traité de 1956 est fait d'une simple juxtaposition des unes et des autres.

Ce ne serait pas, je crois, une vision exacte des choses. D'abord, comme je l'ai indiqué, certaines dispositions relèvent à la fois de l'aspect commercial et de l'aspect amitié — c'est le cas avant tout du standard du traitement équitable repris dans l'article premier du traité. D'autre part, comme la Cour permanente l'a relevé, pour interpréter un traité :

> « Il faut évidemment lire celui-ci dans son ensemble et l'on ne saurait déterminer sa signification sur la base de quelques phrases détachées de leur milieu... » (*Compétence de l'OIT pour réglementer accessoirement le travail personnel du patron, avis consultatif, 1926, C.P.J.I. série B, n° 13*, p. 23.)

Des raisons propres au traité du 21 janvier 1956 imposent avec une urgence particulière de suivre cette directive, d'ailleurs reprise par l'article 31 de la convention de Vienne du 23 mai 1969, et qu'il faut absolument suivre dans la présente espèce.

21. La première des raisons particulières tient à l'esprit même dans lequel cet instrument a été conclu, ou peut-être, plus exactement, à son équilibre général.

Comme l'a écrit M. le Président Elias :

> « Performance in good faith means not only mere abstention from acts

> likely to prevent the due performance of the treaty, but also presupposes a fair balance between reciprocal obligations » (*The Modern Law of Treaties*, Oceana Publications, Sijthoff, Leiden, 1974, p. 43.)

Le Nicaragua a montré, dans son mémoire (**IV**, p. 102 et suiv.), que cet équilibre, si important dans tout traité, serait totalement détruit si le traité de 1956 devait être lu dans une perspective exclusivement commerciale ; il est tout à fait exact que, dans les différents traités d'amitié, de commerce et de navigation qu'ils ont conclus, les Etats-Unis ont fait accepter par leurs partenaires un très grand nombre d'institutions juridiques qui relèvent essentiellement — essentiellement mais pas exclusivement d'ailleurs — du droit international du commerce, par exemple, la clause de la nation la plus favorisée ou le standard du traitement national. Mais ceci n'a été accepté par les Etats cocontractants que dans le cadre d'arrangements plus globaux qui, dans leur esprit, étaient susceptibles d'équilibrer les avantages consentis aux intérêts américains.

Dans le cas présent, comme dans les autres, les « clauses d'amitié », qu'il s'agisse des clauses portant sur le renforcement des liens d'amitié ou sur la coopération pour le développement ont constitué, pour le Nicaragua, la contrepartie des clauses commerciales, dont certaines, dont de nombreuses, n'ont pour un petit pays sous-développé, guère d'intérêt.

22. Plus fondamentalement encore, et ceci de nouveau ressort du préambule, il apparaît que, dans l'esprit des parties au traité du 21 janvier 1956, la promotion du commerce international, au sens large, est un moyen de renforcer leurs liens d'amitié, de même que cette amitié est la condition du développement de leurs échanges. Développement du commerce et renforcement de l'amitié entre les deux peuples sont donc à la fois des objectifs poursuivis par les deux Etats, et chacun d'eux constitue en outre la condition indispensable à la réalisation de l'autre.

Cette interdépendance n'est du reste pas propre au traité de 1956 et a été exprimée dans maints instruments internationaux, on en trouve très nettement la trace, par exemple, dans le préambule et dans l'article 55 de la Charte des Nations Unies, aussi bien que dans plusieurs articles de la charte des droits et devoirs économiques des Etats. Mais, s'agissant du traité liant le Nicaragua et les Etats-Unis, cette interdépendance a été reconnue, on ne peut plus clairement, par les Etats-Unis eux-mêmes, dont la note par laquelle ils ont notifié leur intention de dénoncer cet accord dont je parlais tout à l'heure.

Dans cette note remise au Nicaragua le 1^{er} mai 1985, les Etats-Unis écrivent — je cite presque intégralement la note, elle est très laconique :

> « In view of the policies and actions of the Government of Nicaragua against the peace and security of the Central American region in violation of the Charters of the United Nations and of the Organization of the American States, and the consequent state of relations between Nicaragua and the United States, a situation has for some time existed which is incompatible with normal relations under a treaty of friendship, commerce and navigation. » (Annexe suppl. K.)

Le Nicaragua, il est sans doute inutile de le préciser, fait toutes réserves sur les allégations des Etats-Unis. Il n'en reste pas moins que ces motifs, le fait que l'on ne peut pas appliquer le traité d'amitié, de commerce dans les conditions actuelles, induisent au moins l'accord des deux pays sur un point important : dans l'interprétation du traité, amitié et commerce doivent aller de pair.

23. Le même raisonnement vaut en ce qui concerne les relations non plus entre « amitié » d'une part, et « commerce » d'autre part, mais entre « commerce »

d'une part, et « navigation » d'autre part, l'un et l'autre étant l'objet de ce *jus communicationis* dont j'ai parlé tout à l'heure.

Le rapprochement des deux mots « commerce » et « navigation » dans le titre même du traité paraît tout à fait révélateur de la logique qui a été retenue par les parties : conceptuellement distinctes (le commerce est l'objet, la navigation, le moyen), les deux notions sont étroitement liées. Sans liberté de la navigation et du transit , le commerce est paralysé. Et, inversement, la navigation n'a pas d'objet si la liberté des échanges n'est pas assurée.

Comme l'a remarqué le professeur René-Jean Dupuy, « le droit de la mer a été conçu historiquement comme un droit du transport » (dans R.-J. Dupuy, et D. Vignes, dir. publ., *Traité du nouveau droit de la mer*, Economica, Bruylant, Paris, Bruxelles, 1985, p. 229) et l'on pourrait élargir cette idée en disant que le développement historique du droit de la mer est allé de pair avec l'essor du commerce qu'il a très puissamment contribué à favoriser.

Ces liens entre la liberté du commerce et la liberté de navigation ont été mis en lumière avec beaucoup de clarté par M. Azevedo, dans l'opinion dissidente qu'il avait jointe à l'arrêt de la Cour en date du 9 avril 1949, dans l'affaire du *Détroit de Corfou*. M. Azevedo, prolongeant les constatations de la Cour permanente dans l'avis consultatif relatif à la *Compétence de la commission européenne du Danube (avis consultatif, 1927, C.P.J.I. série B n° 14*, p. 64-66), ou bien dans l'arrêt rendu dans l'affaire *Oscar Chinn (1934, C.P.J.I. séries A/B n° 63)*, p. 65, dont le mémoire du Nicaragua cite de nombreux extraits (par. 418), écrivait :

> « Le droit de passage des navires étrangers à travers la mer territoriale se fonde sur la liberté du commerce, qui, elle-même, présuppose la liberté de navigation, mais on ne peut envisager une opposition entre ces deux acceptions de la liberté. » (*C.I.J. Recueil 1949*, p. 98.)

24. Cette interdépendance voue à l'échec toute tentative pour isoler, dans le traité de 1956, les clauses « commerciales » des clauses « de navigation », exactement de la même manière que le *jus communicationis* conventionnel est indissociable des clauses d'amitié. Toute interprétation des unes doit se faire à la lumière des autres et, dans la plupart des hypothèses, toute violation des unes conduit nécessairement à une violation des autres.

C'est à la lumière de ces observations générales, qu'il convient d'examiner la perte de substance que les Etats-Unis ont fait subir au traité d'amitié, de commerce et de navigation du 21 janvier 1956.

B. Les Etats-Unis ont vidé le traité de 1956 de sa substance

25. Aussi graves que soient les violations de certaines dispositions du traité de 1956, ces violations se situent dans un contexte général, qui, en lui-même, doit être évoqué.

Même si les Etats-Unis n'avaient pas violé directement certaines clauses du traité ce qui n'est pas, Monsieur le Président, et je l'établirai dans la seconde partie de cet exposé , même donc s'ils avaient respecté la lettre de ses divers articles, il n'en resterait pas moins que leur comportement serait contraire aux règles les plus élémentaires du bon sens et de la bonne foi qui, comme l'a souligné sir Hersch Lauterpacht dans l'opinion indivuelle qu'il a jointe à l'avis de la Cour en date du 1er juin 1956 :

> « s'appliquent à tous les instruments juridiques, quels qu'ils soient, dans la mesure où elles ont pour effet d'empêcher une partie qui répudie un instrument, d'en invoquer la lettre ou d'en faire invoquer la lettre à son

> profit —, de manière à rendre impossible l'accomplissement du but de l'instrument » (*Admissibilité de l'audition de pétitionnaires par le comité du Sud-Ouest africain*, *C.I.J. Recueil 1956*, p. 48).

Il ne s'agit pas là d'une simple directive sans portée juridique. Ainsi que sir Humphrey Waldock le relevait en 1964, lors des débats de la Commission du droit international :

> « Il ne suffit pas pour un Etat d'exécuter les dispositions des traités selon la lettre, en soutenant que ses actes ne sont pas directement en contradiction avec les termes du traité ; il est en outre tenu *de l'obligation juridique* de s'abstenir de faire quoi que ce soit qui pourrait en gêner la bonne exécution. » (*Annuaire de la Commission de droit international*, 1964, t. I, p. 30.)

Et, dans son troisième rapport sur le droit des traités, qui faisait l'objet de ces débats, il écrivait :

> « La bonne foi exige notamment que toute partie à un traité s'abstienne de tout acte visant à empêcher que le traité soit dûment exécuté et à réduire ses objets à néant. » (*Ibid.*, t. II, p. 3.)

Comme le même grand maître du droit international l'a rappelé deux ans plus tard, cette obligation juridique « est énoncée implicitement dans la règle *pacta sunt servanda*, telle qu'elle est formulée dans l'article 55 » du projet d'articles sur le droit des traités (devenu l'article 26 de la convention du 26 mai 1969) (*Annuaire de la Commission de droit international*, 1966, t. II, p. 65).

Cette obligation générale, conséquence première du principe fondamental de la bonne foi, qui, comme l'a souligné M. Lachs, « imprègne » tout traité (« General Course of Public International Law », *RCADI*, 1980, t. IV, n° 163, p. 198), a été violée par les Etats-Unis, en ce sens qu'ils ont vidé de sa substance le traité de 1956 dans son ensemble.

26. Ce serait, je pense, lasser la Cour au-delà des limites de la décence que développer longuement l'idée que, dans leur globalité, les faits des Etats-Unis, qui ont été portés à sa connaissance et présentés de nouveau au début de ces audiences par MM. Chayes et Reichler, sont, pour le moins, inamicaux.

Au surplus, ces faits ne sont pas isolés ; ce sont des actes nombreux, concordants et délibérés qui constituent une violation continue, massive et évidente d'un traité qui, quels que soient ses autres aspects, est d'abord — d'abord parce que les parties en ont décidé ainsi en lui donnant son titre même... — un traité d'amitié.

27. Mais ce qui vaut pour l'aspect « traité d'amitié » de notre accord vaut tout autant pour son côté « traité de commerce ». Il est tout aussi clair en effet que, par leur propre action aussi bien que par les actes commis à leur instigation et sous leur contrôle, les Etats-Unis ont tenu en échec le *jus communicationis* que le traité de 1956 codifie.

D'une part, en effet, ils ont cherché — et largement réussi — à paralyser le commerce extérieur et, en partie, intérieur du Nicaragua. D'autre part, ils ont cherché — et, en partie, réussi — à détruire l'objet même de ce commerce.

28. En ce qui concerne la paralysie des moyens du commerce du Nicaragua, elle tient essentiellement à la destruction des installations destinées à rendre ce commerce possible et des moyens d'assurer le transport des marchandises, à la destruction de ce que l'on pourrait appeler les « vecteurs du commerce ».

Les faits pertinents ont également été rappelés avec précision par M. Chayes et par Me Reichler. Je me bornerai donc à citer les plus caractéristiques, pour ce qui est de ma démonstration.

Le premier est évidemment le minage des ports du Nicaragua de janvier à avril 1984, et dont il suffit de rappeler :

- que l'opération a été décidée et conçue aux Etats-Unis et approuvée par le président Reagan lui-même ;
- qu'elle a été effectuée, à partir de navires américains, par des ressortissants des Etats-Unis ou de pays d'Amérique latine liés à la CIA ;
- que les mines étaient de fabrication américaine ;
- que le minage a totalement paralysé l'activité des trois principaux ports du Nicaragua, ceux de Corinto, de Puerto Sandino et d'El Bluff et qu'il a durablement dissuadé certaines compagnies de desservir ces ports ;
- que l'explosion des mines a gravement endommagé de nombreux navires, tant nicaraguayens qu'étrangers ;
- enfin, que le déminage a mobilisé la quasi-totalité de la flottille de pêche du Nicaragua pendant plusieurs semaines.

Voilà, Monsieur le Président, qui ne favorise pas vraiment le commerce !

Mais, pour spectaculaire dans ses manifestations et dramatique dans ses conséquences qu'il ait été, le minage est fort loin d'être demeuré une opération isolée. Il faut y ajouter par exemple :

- la destruction des ponts sur le territoire même du Nicaragua qui permettent la circulation terrestre des marchandises et, en particulier, à quatre reprises au moins, des ponts qui franchissent la route panaméricaine ; il faut rappeler à cet égard que, témoignant devant le Permanent Select Committee on Intelligence, le directeur de la CIA a reconnu, en mai 1982, la responsabilité de l'agence dans la destruction, le 14 mars 1982, de deux ponts d'importance vitale à Rio Negro et à Ocotal ; voilà, qui ne favorise pas vraiment le commerce !
- les attaques destinées à paralyser la navigation aérienne civile, qu'il s'agisse de celle, le 8 septembre 1983, par deux avions Cessna, de l'aéroport international Augusto Sandino à Managua, au cours de laquelle l'un des avions fut abattu et dont les documents de bord ont révélé que cet avion était la propriété d'une société américaine travaillant avec la CIA ; et de celle perpétrée contre un avion appartenant aux lignes aériennes du Nicaragua à Mexico ou de l'explosion d'une bombe sur l'aéroport Sandino, de nouveau, au début de 1982 ;
- la destruction systématique des installations pétrolières du Nicaragua : celles de Benjamin Zeledon ou de Corinto, les 2 et 12 octobre 1983, ou des attaques répétées contre les pipe-lines de Puerto Sandino. Dans tous les cas, des sources officielles américaines ont révélé que la CIA était directement à l'origine de ces opérations (annexe F, pièces n^{os} 51 et 99), ce que confirme d'ailleurs le témoignage de M. Chamorro.

Est-il besoin de préciser que, sans carburant, tout transport, que ce soit par terre, par mer ou par air, et par suite tout commerce, est exclu, à moins d'en revenir à la mule d'antan ou de se contenter de bicyclettes ?

29. Ce qui frappe dans l'énumération — incomplète — de ces opérations, c'est l'identité de leurs objectifs : au-delà de la variété des cibles qu'elles visent, c'est à l'évidence le potentiel économique du Nicaragua que les Etats-Unis veulent atteindre. Il s'agit d'abord d'empêcher ce pays de commercer avec l'extérieur, en détruisant les moyens de transport dont il dispose et en montrant à ses partenaires étrangers qu'ils prennent un risque tout à fait considérable en poursuivant leurs échanges commerciaux avec lui.

Ce plan concerté, conçu par les Etats-Unis, mené à bien pour l'essentiel par eux-mêmes et, de manière plus accessoire, avec leur aide indispensable, n'est compatible ni avec l'esprit général du traité du 21 janvier 1956 — dont l'objectif est, il ne faut pas l'oublier, de « favoriser les échanges commerciaux » dans l'intérêt commun des parties, mais pas seulement entre elles —, mais j'y reviendrai avec plusieurs dispositions précises du traité.

30. Si l'accomplissement de l'un des buts principaux du traité de 1956 — l'expansion des échanges commerciaux — est rendu impossible par les attaques perpétrées contre les vecteurs de ce commerce, c'est-à-dire les moyens de transport, il est également largement compromis par les entreprises des Etats-Unis visant à affaiblir l'activité économique au Nicaragua elle-même, la production de biens et de services, c'est-à-dire, en définitive, l'objet même du commerce que le traité de 1956 entend promouvoir.

Ici encore, l'exposé des faits pertinents a été présenté dans les écritures du Nicaragua et dans les plaidoiries de MM. Chayes et Reichler ; je pense qu'il suffit de faire ressortir les plus saillants.

En tout premier lieu, on peut relever que les atteintes et les sabotages des *contras* sont dirigés de manière systématique contre les objectifs économiques : récoltes, installations de stockage des grains, de séchage du café, etc. Cela ressort clairement, tant des témoignages de M. le vice-ministre Carrion, du ministre Huper, du père Loison ou du témoignage écrit de M. Chamorro, que des rapports établis par de nombreuses autorités impartiales dont celui de M. Reed Brody, celui de l'International Human Rights Law Group et du Washington Office on Latin America ; des extraits significatifs de ces documents sont d'ailleurs reproduits dans le mémoire du Nicaragua (IV, p. 32 et suiv.).

Les pertes qui ont été subies de ce fait par l'économie du Nicaragua sont énormes — une évaluation précise en sera présentée à la Cour en temps utile. Elles affectent tout particulièrement les exportations de coton, de tabac et de café, mais aussi les infrastructures, les routes, les aéroports, les installations de stockage, les usines, etc., qui sont détruites ou rendues inutilisables, ainsi que l'a montré le témoignage de M. Huper.

Cette situation n'aurait pas été possible sans le soutien massif accordé par les Etats-Unis aux *contras*, qui ont été véritablement leur « bras séculier ». Mais il y a plus. De nombreux faits établissent clairement que ces destructions d'objectifs économiques relèvent d'une véritable stratégie définie et mise en œuvre à Washington. On peut lire, par exemple, dans le témoignage écrit de M. Chamorro :

> « In 1984 ... we [il s'agit du FDN] were instructed to destroy export crops (especially coffee and tobacco) and to attack farms and cooperatives. » (Annexe suppl. G, IV, p. 451.)

La volonté systématique des Etats-Unis de rendre le Nicaragua « économiquement exsangue » est attestée également par de nombreux faits dont ils sont eux-mêmes les auteurs, tout à fait ouvertement. Tel est le cas de l'arrêt brutal de toute aide américaine au Nicaragua le 1^er^ avril 1981 ; tel est le cas de la réduction de quatre-vingt-dix pour cent des importations de sucre en provenance du Nicaragua, décidée par les Etats-Unis en mai 1983, ou du veto que ceux-ci ont opposé en mars 1985 au sein de la Banque interaméricaine de développement à un prêt dont le Nicaragua aurait dû bénéficier. Ces faits sont exposés dans le mémoire du Nicaragua (IV, p. 108-109) et j'aurai l'honneur, si vous m'y autorisiez Monsieur le Président, d'y revenir demain lorsque j'évoquerai les atteintes portées par les Etats-Unis au principe général de la non-intervention dans les affaires intérieures des Etats. Bien entendu, l'embargo décidé par les Etats-Unis le 1^er^ mai dernier constitue une preuve complémentaire et indiscutable de la volonté de ce pays d'affaiblir l'économie nicaraguayenne.

Ainsi, Monsieur le Président, il apparaît que, par leur comportement continu et par des actes nombreux, les Etats-Unis ont privé le traité du 21 janvier 1956 de toute substance, et cela dans ses deux « dimensions ». D'une part, en détruisant et en faisant détruire les moyens de communication et de transport du Nicaragua et en affaiblissant considérablement son potentiel économique, ils ont empêché la mise en œuvre du *jus communicationis* conventionnel et ils en ont rendu l'exécution impossible. D'autre part, en se livrant à des actes de recours à la force et en les commanditant, en effectuant et en encourageant des actes hostiles de toute nature contre le Nicaragua, ils ont privé de toute signification la volonté qu'ils ont affichée de renforcer l'amitié entre les deux Etats. Au surplus, ces deux constatations se renforcent et, si l'on peut dire, « s'épaulent » mutuellement.

En demandant à votre haute juridiction de constater que la responsabilité des Etats-Unis est engagée sur ce fondement, le Nicaragua ne suggère pas particulièrement que le traité doit être construit « libéralement » ou qu'il doit être interprété « largement »; il lui apparaît simplement qu'il convient de lui donner ses pleins effets, tels que les parties les ont déterminés, et de considérer que les Etats-Unis, qui ont obtenu des avantages considérables en contrepartie du traité, ne sauraient aujourd'hui rejeter les obligations — commerciales et non commerciales — qu'ils ont librement acceptées il y a une trentaine d'années, pas davantage qu'ils ne peuvent récuser la définition des objectifs, fixés par eux dans le préambule, d'un commun accord avec le Nicaragua. Reprenant, à cet égard, une idée développée par lord McNair :

> « Our submission is that these descriptive phrases and statements ... have a legal effect by way of estoppel. » (*The Law of Treaties*, Clarendon Press, Oxford, 1961, p. 486.)

Il reste maintenant à établir plus précisément qu'indépendamment du traité dans son ensemble, plusieurs, des nombreuses dispositions de celui-ci, ont été violées.

L'audience est levée à 18 heures

VINGT-CINQUIÈME AUDIENCE PUBLIQUE (20 IX 85, 10 h)

Présents : [Voir audience du 12 IX 85.]

M. PELLET : Monsieur le Président, Messieurs de la Cour. Lorsque, à la fin de l'audience d'hier, j'ai interrompu mon exposé consacré aux violations commises par les Etats-Unis d'Amérique au traité d'amitié, de commerce et de navigation du 21 janvier 1956, j'avais établi ou tenté d'établir trois points.

Premièrement, qu'aucune considération ne pouvait s'opposer à l'application de ce traité, en la présente espèce, et que toute violation de celui-ci devait entraîner la responsabilité des Etats-Unis.

Deuxièmement, que ce traité avait une portée extrêmement générale à la fois parce qu'il est un traité commercial *lato sensu* et parce qu'il est un traité d'amitié au sens plein de cette expression.

Enfin, que les Etats-Unis ont par leur comportement et leurs actions privé ce traité de son objet et de son but en le vidant de sa substance aussi bien dans sa dimension commerciale que dans sa dimension amicale.

Pour terminer cet exposé, il me reste à établir que, de même que les Etats-Unis ont vidé de sa substance l'ensemble du traité d'amitié, de commerce et de navigation, de même, ils ont violé, aussi bien l'esprit que la lettre, de nombreuses dispositions de celui-ci et ce sont ces violations d'articles ou de dispositions précises du traité qui font l'objet de la seconde partie de cet exposé.

II. Les Etats-Unis ont violé de nombreuses dispositions du traité de 1956

Il convient de rappeler à cet égard que, lors de la précédente phase du présent litige, les Etats-Unis se sont efforcés de minimiser la porté du traité du 21 janvier 1956, non seulement en lui déniant toute signification non commerciale mais encore en citant exclusivement les dispositions par lesquelles chacune des parties reconnaît des droits aux ressortissants de l'autre partie — et seulement à ces ressortissants — lorsqu'ils se trouvent sur leur territoire respectif et seulement lorsqu'ils se trouvent sur ce territoire (voir contre-mémoire, **II**, p. 53-58). Les Etats-Unis ont d'ailleurs repris cette argumentation dans leur déclaration sur leur retrait de la procédure en cours (ce communiqué constitue la pièce III-4 de l'annexe C au mémoire du Nicaragua). Dans ce communiqué il est écrit : « The FCN Treaty on its face deals entirely with commercial matters in the treatment of one country's nationals in the territory of the other » (« au traitement réservé aux ressortissants d'un des deux Etats sur le territoire de l'autre »). Ces assertions, Monsieur le Président, sont doublement inexactes. D'un côté, de nombreuses dispositions sont, si l'on peut dire, « non situées » en ce sens qu'elles ouvrent des droits à chacune des parties et à leurs ressortissants où que ceux-ci puissent se trouver et souvent quels que soient leurs partenaires ; d'autre part, la responsabilité des Etats-Unis peut se trouver engagée sur le fondement de clauses que l'on pourrait appeler « territorialement situées », limitées en apparence au territoire de l'un des deux Etats, si, alors que les Etats-Unis en respecteraient la lettre, ils en bafouent l'esprit et les privent dès lors de toute signification. Dans les développements qui vont suivre nous retrouverons cette distinction entre « clauses territoriales» et «clauses non territoriales», aussi bien à propos des violations de ce que j'ai appelé les «clauses d'amitié» du traité de 1956, qu'en ce qui concerne les violations de ses dispositions commerciales. Mais avant de passer à l'étude des unes et des autres il convient, je crois, de faire une place à part à l'article premier du traité qui relève à la fois des clauses d'amitié et des dispositions commerciales.

A. Les violations de l'article premier

J'en viens donc tout de suite à l'analyse des violations par les Etats-Unis des dispositions de l'article premier du traité de 1956. Aux termes de l'article premier de ce traité :

> «Chacune des deux parties accordera, en tous temps, un traitement équitable aux nationaux et aux sociétés de l'autre partie, ainsi qu'à leurs biens, entreprises et autres intérêts.»

Cette clause revêt une importance tout à fait particulière. D'abord, en la plaçant en tête de leur convention, les parties ont entendu marquer l'importance qu'elles y attachaient.

Par ailleurs, l'article premier est un exemple tout à fait caractéristique des dispositions dont j'ai indiqué qu'elles n'étaient pas situées. Le traitement équitable, qu'en vertu de cette clause chaque Etat s'oblige à accorder aux ressortissants de l'autre partie ainsi qu'à leurs biens et à leurs intérêts, n'est aucunement circonscrit territorialement. Autrement dit, ceci signifie que les Etats-Unis doivent respecter cet engagement, s'agissant des citoyens du Nicaragua, s'ils se trouvent à New York, à San Francisco ou à Miami, bien sûr ; mais ils doivent aussi adopter la même attitude si les ressortissants du Nicaragua vivent à Managua, à Esteli ou à Corinto — ou même, s'ils se trouvent à Paris, à Calcutta ou à Mexico (et ce n'est pas à vrai dire une hypothèse d'école puisqu'un avion appartenant aux lignes aériennes du Nicaragua a été victime d'un acte de terrorisme alors qu'il se trouvait sur l'aéroport précisément de Mexico).

Au surplus, la rédaction extrêmement générale que les parties ont retenue fait de cette disposition de très grande portée une sorte de synthèse du traité dans son ensemble, en ce sens que l'article premier concerne aussi bien le volet si l'on peut dire «commercial» du traité que son aspect «amical». Cette double appartenance est attestée par le fait que sont mentionnés dans l'article premier, d'un côté, les «nationaux et sociétés» des deux Etats — ce qui a un sens extrêmement général —, et, de l'autre, «leurs biens, entreprises et autres intérêts», ce qui a évidemment une résonance plus mercantile, bien qu'après tout les «autres intérêts» puissent être de toute nature.

Le Nicaragua admet bien volontiers qu'une clause de traitement équitable n'a pas une signification aussi précise que, par exemple, le standard du traitement national ou la clause de la nation la plus favorisée. Néanmoins, ce traitement équitable constitue ici une disposition conventionnelle et, comme je l'ai rappelé hier à propos des clauses d'amitié en général, c'est un principe bien établi du droit international que les mots qui figurent dans un instrument juridique ne peuvent pas être privés de toute signification (voir Cour permanente d'arbitrage, affaire des *Pêcheries de l'Atlantique Nord*, sentence du 7 septembre 1910, *RSA*, XI, p. 198).

Or, Monsieur le Président, quel que soit le sens exact du standard du traitement équitable, ce standard serait absolument vide de toute substance si le traitement qui est infligé aux ressortissants du Nicaragua par les Etats-Unis (ou par les forces que ceux-ci contrôlent) devait être tenu pour équitable. Et ceci est vrai, aussi bien si l'on considère le traité de 1956 dans sa dimension « commerciale », que si l'on envisage ce traité dans ses aspects généraux.

35. S'agissant d'abord des aspects commerciaux, puisque les Etats-Unis ne nient pas qu'il s'agit tout de même d'un traité de commerce, il paraît tout à fait impossible de considérer que les biens des nationaux et des sociétés du Nicaragua reçoivent un « traitement équitable » lorsque des navires qui appartiennent à des pêcheurs de ce pays sautent sur des mines posées dans les conditions que l'on sait, par exemple à El Bluff le 25 février 1984, ou à Corinto, les 27, 29 et 30 mars suivant.

L'hésitation n'est pas davantage possible s'agissant :

des maisons de paysans détruites par les *contras* ;
de leurs champs saccagés ;
des installations de stockage de denrées alimentaires, ou de café ou de tabac, systématiquement incendiées, qu'elles appartiennent à des citoyens du Nicaragua, à des sociétés ou à des coopératives ;
l'hésitation n'est pas davantage possible s'il s'agit des réservoirs de pétrole de Corinto bombardés ou de l'oléoduc de Puerto Sandino saboté, sous la supervision directe de la CIA.

Et ces pertes, qui sont les conséquences d'actions directes des Etats-Unis ou de décisions qu'ils ont prises, et fait appliquer sont, à l'évidence, contraires à la garantie donnée par ce pays d'accorder un traitement équitable aux ressortissants du Nicaragua.

36. Cependant, Monsieur le Président, aussi graves que soient ces atteintes portées tant à la lettre qu'à l'esprit de l'article premier de l'accord de 1956, le « traitement équitable » que cette disposition garantit aux nationaux et aux sociétés de chacune des parties, ainsi qu'à l'ensemble de leurs biens et intérêts, ce traitement équitable ne saurait être réduit aux aspects purement mercantiles du traité, même si ces aspects commerciaux sont en effet protégés par le traité, et même si ces intérêts et ces biens, au sens commercial, au sens économique du terme, n'ont pas été respectés par les Etats-Unis.

Monsieur le Président, il y aurait beaucoup de cynisme à en rester là. Et ce serait, au demeurant, profondément illogique : si les intérêts commerciaux et, plus largement, si les intérêts économiques d'une personne sont protégés, il en va à plus forte raison ainsi de sa dignité et de son intégrité physique.

Pour les seuls besoins du raisonnement, j'efface les destructions de navires qui ont résulté du minage des ports, les pertes économiques qui sont la conséquence du bombardement des installations pétrolières, de l'aéroport de Managua, des ponts de la route panaméricaine ; je gomme l'incendie des entrepôts de blé et des récoltes de café ; je biffe les balles de coton qui pourrissent dans les ports et le sucre qui n'est pas acheté en dépit des engagements pris. Tout cela, on l'imagine, ne s'est pas produit. Il n'y a pas eu d'atteinte à la liberté du commerce et de la navigation... Est-ce que pour autant nous pouvons dire que les Etats-Unis ont accordé un « traitement équitable » à l'équipage du bateau-crevettier *Alma Saltana* qui a explosé sur une mine le 30 mars 1984 dans le port de Corinto (annexe J, p. 2). Est-ce que les Etats-Unis ont accordé un traitement équitable à plus de 20000 habitants de Corinto qui ont dû être évacués dans des conditions difficiles tandis que brûlaient les installations pétrolières bombardées directement par les Etats-Unis (annexe F, pièces n^{os} 98 et 99). Ont-ils accordé un traitement équitable à la petite fille blessée et à ses quatre frères et sœurs tués par un tir de mortier à San Gregorio en octobre 1984 et qu'évoquait, parmi tant d'autres, le père Loison dans sa déposition mardi matin ; ont-ils accordé un traitement équitable à tous ces morts, à tous ces blessés, à toutes ces femmes violées ?

La réponse, Monsieur le Président, ne peut, me semble-t-il, faire le moindre doute ; ici encore, quelle que puisse être la définition d'un traitement équitable, il ne l'a pas été. Et comme MM. Chayes et Reichler l'ont montré, ce sont les Etats-Unis qui ont posé les mines dans les ports nicaraguayens ; ce sont eux qui ont bombardé Corinto ; ce sont eux qui ont armé les assassins des enfants de San Gregorio, ce sont eux qui les ont contrôlés, qui les ont formés, et qui leur ont ordonné de procéder de cette manière indiscriminée — comme cela ressort de maintes pièces du dossier et, notamment, du témoignage écrit de M. Chamorro.

Je ne crois pas qu'il y ait besoin d'un accord international pour que de tels agissements soient contraires au droit des gens. Mais je sais qu'il ne peut y avoir le moindre doute sur le fait qu'ils sont incompatibles aussi bien avec la lettre, qu'avec l'esprit, de l'article premier du traité de 1956.

B. Les violations des « clauses d'amitié » du traité de 1956

37. Abandonnons l'article premier de ce traité. Je vais passer en revue rapidement les violations des autres clauses d'amitié du traité de 1956. En effet le traité d'amitié du 21 janvier 1956 contient, à côté des dispositions commerciales, des « clauses d'amitié » qui visent non pas à protéger les intérêts économiques des ressortissants des deux Etats, mais à protéger ceux-ci en tant que personnes ou, plus largement encore, à renforcer les relations amicales entre les deux Etats et entre les deux peuples.

On peut penser, par exemple, à la mention dans le préambule, du désir des deux Etats de « favoriser entre leurs peuples respectifs l'établissement de relations ... culturelles plus étroites ». On peut citer aussi l'article II, paragraphe 2, par lequel les deux parties s'engagent à encourager « les contacts mutuels entre leurs peuples » et à faciliter, « autant qu'il est possible, les voyages des touristes et des autres visiteurs ».

Dire que le comportement des Etats-Unis ne tend guère à la réalisation de ces objectifs relève évidemment de la litote.

Il convient en outre de mentionner ici une autre disposition, plus limitée dans sa portée mais qui présente, dans le contexte de la présente affaire, un intérêt tout particulier. Cette disposition c'est l'article XXI, paragraphe 1, *c)* et *d)*, du traité de 1956, dont M. le Président Singh a montré, dans l'opinion individuelle jointe à l'arrêt relatif à la compétence de la Cour et à la recevabilité de la requête, qu'interprétée *a contrario* elle apparaissait comme une disposition de fond (*C.I.J. Recueil 1984*, p. 447) dont il paraît difficile de penser qu'elle a été respectée en l'espèce par les Etats-Unis, car les buts et les « nécessités » auxquels, dans le premier cas (alinéa *c)*), la licéité du commerce des armes, et, dans le second cas (alinéa *d)*), l'adoption de mesures spécifiques sont subordonnées, ne sont, à l'évidence, pas réunies en l'espèce.

38. Les dispositions que je viens de citer imposent aux Parties des obligations de comportement de caractère général. Elles s'ajoutent à d'autres, plus nombreuses, que l'on peut qualifier de clauses « territoriales » car, ces articles pris à la lettre ne s'appliquent aux nationaux de l'une des Parties que s'ils se trouvent sur le territoire de l'autre.

Tel est le cas, en particulier, de l'article II, paragraphe 2, qui garantit aux nationaux de chacune des Parties — pour simplifier le raisonnement, je dirai : « aux nationaux du Nicaragua », puisque c'est d'eux qu'il s'agit —, qui garantit donc aux nationaux du Nicaragua, lorsqu'ils se trouvent aux Etats-Unis, les libertés de circulation, de conscience, de religion, d'information et de communication.

C'est le cas aussi de l'article III, paragraphe 1, qui dispose:

> « Les nationaux de l'une des deux parties ne seront exposés, sur les territoires de l'autre partie, à aucune molestation illégale, quelle qu'elle soit, et ils bénéficieront de la manière la plus constante d'une protection et d'une sécurité qui ne devront en aucun cas être inférieures aux normes fixées par le droit international. »

C'est le cas enfin — je cite toujours les clauses territorialement situées du traité qui me paraissent avoir un intérêt dans notre affaire — de l'article VI, paragraphe 1 :

> « La protection et la sécurité des biens appartenant aux nationaux et aux sociétés de l'une des deux parties seront assurées de la manière la plus constante sur les territoires de l'autre partie. »

Monsieur le Président, le Nicaragua ne nie en aucune manière que, dans les trois cas que je viens de citer, il est bien écrit : « sur les territoires de l'autre partie ». Mais est-il raisonnable de considérer que, sous prétexte que le paragraphe 1 de l'article III précise que les citoyens du Nicaragua ne seront exposés à aucune molestation illégale sur le territoire des Etats-Unis, ces mêmes personnes peuvent être molestées — et le terme est ici encore, de nouveau, bien faible — par les Etats-Unis (ou sur l'ordre de ceux-ci) lorsqu'elles se trouvent au Nicaragua ?

A vrai dire, ce que les trois dispositions que je viens de citer interdisent expressément sur le territoire des Etats-Unis, elles l'interdisent aussi, implicitement certes, mais à fortiori, sur le territoire du Nicaragua. (Et l'on peut remarquer, d'ailleurs, que le traité de 1956 reconnaît dans son article VIII, paragraphe 2, interprété *a contrario*, qu'il est possible de déduire implicitement des dispositions du traité des droits qu'il ne garantirait pas expressément.) Au surplus, toute autre interprétation irait à l'encontre des buts mêmes du traité d'amitié, de commerce et de navigation de 1956, tels qu'ils sont énoncés dans son préambule, et serait contraire aux règles les plus élémentaires du bon sens et de la bonne foi.

39. Dans cette perspective, il paraît difficile de ne pas voir dans les actions des Etats-Unis une violation des libertés qui sont garanties par l'article II, paragraphe 2, de notre traité et, en particulier, de la liberté de circulation — rendue plus que problématique par l'insécurité entretenue par la *contra* dans certaines zones — ou même des violations de la liberté de conscience. Il est difficile aussi de ne pas voir dans les bombardements et les sabotages auxquels se livrent les *contras*, sous le contrôle et pour le compte des Etats-Unis, des actions qui portent atteinte à la sécurité des biens, assurée par l'article VI, paragraphe 1. Et il paraît encore plus difficile de nier que les nombreux actes cruels, inhumains et dégradants accomplis dans les mêmes conditions, et dans le détail desquels il ne me semble pas utile de revenir ici, constituent autant de « molestations illégales », au sens de l'article III, paragraphe 1, du traité.

C. *La violation du* jus communicationis *conventionnel*

40. Il est permis de formuler le même genre de remarques en ce qui concerne ce que j'ai appelé le *jus communicationis* conventionnel, c'est-à-dire l'ensemble des clauses de « commerce » et de navigation.

Le recensement systématique de ces clauses permet d'établir tout à fait nettement, me semble-t-il, que le traité du 21 janvier 1956 est très loin d'avoir une portée territoriale et exclusivement territoriale comme les Etats-Unis ont voulu le faire croire durant la première phase de cette affaire.

On peut remarquer tout d'abord que la portée proprement territoriale du traité est étendue à la haute mer par l'article XIX, paragraphe 2 (et aux « pêcheries nationales » par l'article XIV, paragraphe 6 *a)* — et, aujourd'hui, les « pêcheries nationales », cela comprend au moins la zone économique exclusive).

De plus — et ceci est sans doute d'une plus grande portée —, on relève ici encore, c'est-à-dire s'agissant des clauses commerciales, des dispositions par lesquelles chaque partie assume des obligations à l'égard de l'autre partie ou de ses ressortissants sans considération de lieu. Indépendamment de l'article premier, sur lequel je me suis assez longuement étendu et sur lequel je ne reviens pas, tel est le cas par exemple de l'article XI, paragraphe 2, qui concerne exclusivement les nationaux et les sociétés de l'une des parties qui précisément ne résident pas sur les territoires de l'autre partie.

Surtout, il est tout à fait révélateur, que par plusieurs dispositions du traité de 1956, chaque partie garantit aux ressortissants de l'autre partie qu'elle adoptera à leur égard une attitude bienveillante, quels que soient, si l'on peut dire, les « partenaires ». En d'autres termes, cela signifie que les Etats-Unis se sont engagés à ne pas mettre d'obstacle aux relations « commerciales » (au sens large toujours) existantes ou à venir entre les ressortissants du Nicaragua et des clients ou des fournisseurs qui relèvent de pays tiers.

41. Trois dispositions sont particulièrement significatives à cet égard.

C'est d'abord le cas de l'article X, paragraphe 3, selon lequel :

> « Aucune des deux parties n'empêchera arbitrairement les nationaux ou les sociétés de l'autre partie de se procurer dans des conditions équitables, par les voies commerciales normales, les capitaux, les connaissances théoriques et pratiques et les techniques dont cette autre partie a besoin pour assurer son développement économique. »

J'insiste sur cet article X, paragraphe 3. Il n'est pas dit « de se procurer sur le territoire de l'autre partie » ; il n'est pas dit « de se procurer aux Etats-Unis ». Il est dit simplement : « de se procurer », sans autre précision ; ce qui veut dire : de se procurer « n'importe où » ; de se procurer « aux Etats-Unis ou ailleurs ». Cette interprétation ne fait aucun doute si l'on confronte cette disposition aux nombreuses autres clauses du traité qui, pour leur part, prennent, au contraire, soin de préciser « sur le territoire de l'autre partie », ou bien « de la part de l'autre partie » ; ici, il n'y a rien de ce genre et il s'agit d'une clause importante.

On peut en effet admettre que cette disposition — j'en suis toujours à l'article X, paragraphe 3 — constitue l'un des éléments les plus convaincants de l'équilibre global des dispositions conventionnelles dont j'ai parlé hier : si les Etats-Unis avaient, et ont, assurément, peu à attendre du Nicaragua en matière de capitaux et de technologies, la réciproque n'est certainement pas exacte. Or cet engagement que les Etats-Unis ont pris de faciliter, fût-ce « par les voies commerciales normales », mais « dans des conditions équitables », le développement économique du Nicaragua, est ouvertement bafoué dès lors que la grande puissance nord-américaine fait tout ce qui est en son pouvoir pour contrarier ce développement — dans des conditions que j'ai suffisamment évoquées hier pour n'avoir à y revenir.

Dans le même esprit, le paragraphe 1 de l'article XII est ainsi rédigé :

> « Les nationaux et les sociétés de l'une des parties obtiendront de l'autre partie le traitement national et le traitement de la nation la plus favorisée en ce qui concerne les instruments constatant une opération financière entre les territoires des deux parties ainsi qu'entre les territoires de l'autre partie et les territoires d'un pays tiers. »

Cette dernière expression est tout à fait claire : ce sont bien les opérations financières avec les tiers qui sont en cause. Et le paragraphe 4 du même article doit également être interprété en ce sens.

Bien sûr, j'ai abordé là des dispositions qui ont sans aucun doute un objectif assez technique, qui font appel à des standards qui ont une signification relativement précise, il n'en reste pas moins que les obstacles que les Etats-Unis s'ingénient à multiplier à l'encontre du Nicaragua, lorsque celui-ci cherche à se procurer auprès des organismes internationaux de financement les moyens de son développement, ne sont pas davantage conformes à l'esprit de l'article **XII** du traité qu'à la lettre et à l'esprit de l'article **X**.

La troisième disposition qui, dans cet esprit, mérite d'être mentionnée et qui, elle non plus, n'a pas une portée exclusivement territoriale, est l'article **XVII**, paragraphe 3, qui prévoit que « les deux parties feront en sorte de ne pas empêcher la possibilité pour les ressortissants de l'autre partie de contracter des assurances maritimes pour leur commerce ».

Sans doute, la lettre de l'article **XVII**, paragraphe 3, ne donne-t-elle de garanties qu'en ce qui concerne les assurances contractées « auprès des compagnies de l'autre partie », mais ces garanties doivent bénéficier aux importateurs et aux exportateurs de produits originaires de l'un ou de l'autre pays, quelle que soit la nationalité de ces opérateurs.

Et cette disposition n'a pas été davantage respectée par les Etats-Unis que les précédentes. Le Nicaragua a montré, dans son mémoire (**IV**, p. 111), que les activités militaires et paramilitaires des Etats-Unis avaient entraîné une hausse considérable du coût de l'assurance maritime (aussi bien, d'ailleurs, que de l'assurance aérienne) applicable au fret en direction ou en provenance du Nicaragua, y compris de la part des assureurs américains, dont les tarifs suivent les fluctuations des indices de la Lloyd's de Londres (qui apparaissent dans la pièce 6 de l'annexe **K** au mémoire du Nicaragua).

42. Etant donné — et j'en aurai pratiquement fini avec ce premier exposé la très grande importance que présente pour le règlement du présent litige, l'article **XIX**, paragraphe 1, du traité d'amitié, de commerce et de navigation du 21 janvier 1956, le texte et l'esprit de cette disposition doivent faire l'objet d'une analyse particulièrement attentive.

Cet article **XIX**, paragraphe 1, dispose :

> « 1. Il y aura liberté de commerce et de navigation entre les territoires des deux parties.»

Cette rédaction, Monsieur le Président, appelle deux séries de commentaires :

En premier lieu il ne fait aucun doute que le bénéfice de cet article s'étend à la fois aux navires battant pavillon des Etats-Unis (et, sans doute, à leurs aéronefs qui sont, aujourd'hui, l'un des moyens normaux du commerce) et aux navires et aéronefs des Etats tiers. En d'autres termes, il est tout à fait clair que les agissements des Etats-Unis — sur lesquels je me suis assez longuement étendu hier et qui, depuis le début de ces audiences, ont fait l'objet de descriptions précises : le minage des ports, le bombardement de l'aéroport de Managua, la destruction des réserves de carburant de Corinto, etc. — constituent autant de violations de l'article **XIX**, paragraphe 1, du traité de 1956, dès lors qu'ils font échec au commerce et à la navigation entre les territoires des deux Etats, que ce commerce soit le fait de transporteurs américains ou de transporteurs du Nicaragua ou encore de transporteurs d'Etats tiers. Et ces violations par les Etats-Unis, à elles seules, suffisent à justifier que la Cour reconnaisse que la responsabilité des Etats-Unis est engagée sur le fondement de l'article **XIX**, paragraphe 1.

43. En revanche, Monsieur le Président, je reconnais volontiers que la réponse à la question de savoir si la liberté de commerce et de navigation garantie par l'article XIX, paragraphe 1, du traité s'étend aux relations commerciales et maritimes de chaque partie avec les pays tiers, paraît, à première vue, moins évidente.

Un argument de texte et la logique même de cette disposition, et sans doute du traité dans son ensemble, conduisent, cependant, à écarter une réponse étroitement « territoriale ».

En premier lieu, le paragraphe 3 de l'article XIX aligne le régime applicable aux navires de l'une des parties sur celui qui vaut pour ceux de l'autre Etat contractant, d'une part, et pour les navires de tout Etat tiers, d'autre part. Si on lit l'article XIX, paragraphe 3 (je ne vais pas le relire en entier), il est clair que la navigation par des navires battant pavillon de pays tiers est visée par cette disposition. Et ceci paraît bien impliquer que c'est une conception large de la liberté de commerce et de navigation que les deux parties avaient à l'esprit.

En second lieu et surtout, le raisonnement que j'ai développé hier, à propos de certaines clauses d'amitié du traité de 1956, paraît valoir à fortiori ici : il n'est pas raisonnable de penser que les Etats-Unis, qui se sont engagés, par l'article XIX, paragraphe 3, à accorder aux navires du Nicaragua libre accès à leurs ports et mouillages, dans les mêmes conditions qu'à ceux des Etats tiers, c'est-à-dire aux ports et mouillages des Etats-Unis, puissent s'abriter derrière la lettre de cette disposition et du paragraphe 1 de l'article XIX, pour affirmer la licéité d'un comportement qui, dans les faits, revient à interdire aux navires nicaraguayens et aux navires des pays tiers l'accès... aux ports du Nicaragua lui-même et la faculté de commercer avec ce pays. Il n'est pas raisonnable de penser que les Etats-Unis se sont engagés à permettre l'accès à leurs propres ports, en même temps qu'ils peuvent interdire l'accès aux ports du Nicaragua.

Est-il besoin d'ajouter qu'une telle interprétation serait tout à fait incompatible avec l'esprit général du traité du 21 janvier 1956. Et ceci serait d'autant plus inadmissible que l'article XIX, paragraphe 1, dans l'acceptation large qu'il convient de lui reconnaître, ne fait en réalité que rappeler des principes coutumiers bien établis, qui, en tout état de cause, s'imposent aux Parties en l'absence même de toute disposition conventionnelle, ainsi que mon savant ami, le professeur Brownlie, le rappellera tout à l'heure.

Il est du reste extrêmement révélateur que, dans son arrêt du 26 novembre 1984, la Cour elle-même, loin d'évoquer la possibilité d'une interprétation abusivement rigide de l'article XIX du traité, a présenté celui-ci comme « prévoyant la liberté de commerce et de navigation » (*C.I.J. Recueil 1984*, p. 428), et, à vrai dire, cette lecture paraît assez évidente.

Mutatis mutandis, les mêmes considérations valent s'agissant de la liberté de transit garantie par l'article XX de notre traité et je n'essaierai pas de me livrer de nouveau à cette démonstration car le temps passe.

Au bénéfice de ces remarques, il paraît difficilement contestable que les Etats-Unis ont totalement tenu en échec l'article XIX, paragraphe 1 ; et pour les mêmes raisons que j'ai développées lorsque je me suis efforcé de montrer que c'est l'ensemble du *jus communicationis* conventionnel que les Etats-Unis ont tenu en échec.

Je m'abstiendrai donc d'insister davantage.

Je vous demande seulement, Monsieur le Président, de bien vouloir m'autoriser à prendre encore quelques secondes du temps de la Cour pour résumer très brièvement les conclusions auxquelles me semblent conduire les considérations liées au traité d'amitié, de commerce et de navigation du 21 janvier 1956 que je viens de présenter.

Durant la précédente phase de cette affaire, les Etats-Unis ont affirmé avec beaucoup de conviction apparente la non-pertinence du traité d'amitié dans cette affaire. Un examen attentif montre non seulement qu'un grand nombre des dispositions de cet instrument ont été violées — soit dans leur lettre (et il y en a davantage que l'on aurait pu penser à première lecture), soit dans leur esprit parce qu'il n'est, tout simplement, plus possible de mettre ces dispositions en œuvre, et ceci, à vrai dire, vaut pour certaines dispositions aussi bien que pour le traité dans son ensemble. D'abord, bien sûr, parce qu'il s'agit d'un traité d'amitié et que force est de constater que l'actuel gouvernement des Etats-Unis a de l'amitié une conception singulière et, si l'on peut dire, fâcheusement « explosive ». Cela relève de l'évidence et l'on comprend que, durant l'examen des exceptions préliminaires qu'ils ont soulevées, les Etats-Unis se soient efforcés de gommer de notre traité tout ce qui n'avait pas un caractère commercial et technique.

Cependant, et quand bien même ils y auraient réussi, ils auraient dû assumer les conséquences des formes qu'ils ont délibérément choisies de donner à ce qui est plutôt de l'inimitié que de l'amitié, en particulier de la guerre économique qu'ils mènent au Nicaragua et contre lui, et qui n'encourage pas davantage le commerce que les activités militaires et paramilitaires, auxquelles ils se livrent ou qu'ils contrôlent, ne favorisent l'amitié entre les deux peuples.

Monsieur le Président, les attaques armées des Etats-Unis contre le Nicaragua, leurs incursions dans ses eaux territoriales, l'utilisation de la force et de la menace de la force contre celui-ci, les atteintes portées au principe de la liberté des mers, l'interruption du commerce maritime et aérien pacifique, les dommages causés aux citoyens du Nicaragua sont autant de griefs qui sont articulés sous les lettres *a)* à *f)* de la requête du Nicaragua. Ce sont aussi des faits dont la commission n'est pas compatible avec l'idée d'un traité d'amitié, pas plus qu'elle n'est compatible avec celle d'un traité de commerce et de navigation. Les Etats-Unis, qui ont dénoncé formellement le traité en mai dernier, se sont pourtant comportés comme s'il n'existait plus depuis 1981. La responsabilité des Etats-Unis est engagée sur cette base et ils doivent réparation des dommages subis par le Nicaragua en conséquence de ces violations. Dès lors, les conclusions énoncées sur les lettres *g)* et *h)* de la requête s'appliquent pleinement aux violations par les Etats-Unis du traité de 1956.

Cela conclut, Monsieur le Président, ma première plaidoirie. Je n'ai pu éviter d'entrer dans certains détails techniques qui, d'une certaine manière, contrastent avec le « profil » général de cette affaire. Malgré cela, vous avez bien voulu ne pas manifester d'impatience et ceci m'est une raison supplémentaire de vous exprimer ma vive reconnaissance pour votre attention patiente.

The **PRESIDENT**: Would the Agent of Nicaragua indicate who will be the next counsel to address the Court?

Mr. **ARGÜELLO GÓMEZ**: Mr. Pellet will continue with the intervention of the United States in the internal affairs of Nicaragua.

M. **PELLET**: Monsieur le Président, Messieurs de la Cour, les hasards du partage des tâches entre les conseils du Nicaragua font que je me succède à moi-même à cette barre puisque, après avoir développé les questions liées au traité de 1956, il m'incombe d'ébaucher la discussion relative aux violations commises par les Etats-Unis de leurs obligations en vertu du droit coutumier, violations dont mon savant collègue, le professeur Brownlie, tirera les conséquences dans quelques instants sur un plan plus général.

L'INTERVENTION DES ETATS-UNIS DANS LES AFFAIRES INTÉRIEURES DU NICARAGUA

1. En ce qui me concerne, mon second exposé portera exclusivement sur l'intervention des Etats-Unis d'Amérique dans les affaires intérieures et extérieures du Nicaragua, au mépris des principes du droit international.

Je pense d'emblée pouvoir rassurer la Cour sur un point qui, après plus d'une semaine d'audiences, peut la préoccuper : cette seconde plaidoirie sera beaucoup plus brève que celle qu'elle vient d'écouter avec tant de bienveillance. Si je peux oser cet aveu, Monsieur le Président, je dirais respectueusement, que mon souci de ne pas importuner la Cour par une présence trop longue à cette barre est favorisé par le thème même que je dois traiter.

En effet, en se présentant devant vous dans cette affaire, les conseils du Nicaragua ont souvent éprouvé une certaine gêne, tant ils avaient le sentiment de plaider l'évidence, tant il leur a semblé à maints points de vue qu'il n'était guère nécessaire de démontrer par de longs raisonnements des atteintes au droit international que le seul énoncé des faits suffit à établir. Ce sentiment, je l'éprouve avec une acuité particulière en abordant la question de l'intervention des Etats-Unis dans les affaires du Nicaragua.

2. Sous la lettre *d)* de sa requête du 9 avril 1984, le Nicaragua a prié la Cour de dire et juger :

> « *d)* Que les Etats-Unis, en violation de leurs obligations en vertu du droit international général et coutumier, sont intervenus et interviennent dans les affaires intérieures du Nicaragua. »

A première vue, cette conclusion peut paraître plus étroite que celle fondée sur la violation par les Etats-Unis de leurs obligations de ne pas violer la souveraineté du Nicaragua ou de ne pas recourir à la force et à la menace de la force contre celui-ci. Dès lors, en particulier, qu'un manquement à ce dernier principe — au principe de l'interdiction du recours à la force — est établi — que ce soit sur le fondement de la Charte des Nations Unies, comme M. Chayes l'a montré hier, ou que ce soit sur le fondement du droit coutumier, comme M. Brownlie le montrera tout à l'heure —, du même coup, et *ipso facto*, le principe de non-intervention se trouve violé, l'emploi de la force, qu'il s'analyse ou non en une agression, constituant toujours et inévitablement ce que l'on pourrait appeler le « stade suprême de l'intervention ».

3. Néanmoins, établir la violation par les Etats-Unis du principe de l'interdiction de l'intervention dans les affaires intérieures des Etats n'est pas pour autant un exercice totalement vain — cinq raisons au moins me semblent lui conférer un réel intérêt :

i) le principe de non-intervention constitue une règle coutumière dont l'existence est indépendante du principe de l'interdiction de recours à la force ;
ii) s'ils ne sont, à l'évidence, pas dépourvus de tous liens, les deux principes, celui de l'interdiction de l'intervention et celui de l'interdiction du recours à la force, ne se recouvrent pas et l'interdiction de l'intervention dans les affaires intérieures des Etats a une portée plus large que le principe de l'interdiction du recours à la force ;
iii) s'il n'est pas douteux que le principe de la non-ingérence est une notion à contenu variable, ou si l'on veut, « un pavillon recouvrant des marchandises extrêmement diverses », les conditions de sa violation se trouvent remplies dans la présente espèce, aussi étroite que puisse être la définition que l'on retient ;
iv) quelle que puisse être la pertinence, dans l'abstrait, des efforts doctrinaux

pour opérer une distinction entre les interventions licites, d'une part, et les ingérences illicites, d'autre part, les faits qui sont imputables aux Etats-Unis dans la présente affaire ne peuvent entrer dans aucune des hypothèses dans lesquelles, selon certains auteurs, le droit international admet l'intervention ; enfin,

v) par le fait même qu'ils sont intervenus et qu'ils continuent d'intervenir dans les affaires intérieures du Nicaragua, et compte tenu des conditions dans lesquelles leur intervention se produit, les Etats-Unis contreviennent du même coup à d'autres principes fondamentaux du droit international contemporain et, en particulier, à celui de l'égalité de droits des peuples et de leur droit à disposer d'eux-mêmes et à celui de la souveraineté des Etats sur leurs ressources naturelles et leurs activités économiques.

Partant de ces considérations, mon exposé s'articulera successivement autour des quatre propositions suivantes :

a) le principe de non-intervention est un principe coutumier de caractère autonome ;
b) le principe de non-intervention fait, en la présente espèce, l'objet de violations manifestes de la part des Etats-Unis, aussi étroite que soit la définition que l'on en donne ;
c) ces violations sont indissociables d'autres manquements très graves à d'autres principes du droit international qui en sont la conséquence ;
d) ces violations n'ont aucune justification juridique.

Pour rassurer la Cour, je lui dirai que je ne m'attarderai quelque peu que sur la deuxième proposition, celle concernant les violations par les Etats-Unis dans le cas présent.

J'aborde tout de même la première.

I. *Le principe de non-intervention est un principe coutumier de caractère autonome*

4. L'autonomie du principe de non-intervention tient à la fois à son histoire, à ses fondements et à sa portée.

5. Il ne me paraît pas établi, Monsieur le Président, qu'il y ait un droit international nouveau qui s'opposerait à l'« ancien droit ». Mais, si tel était le cas, il ne fait aucun doute que c'est dans ce droit ancien, dans ce droit traditionnel, qu'il faudrait chercher les racines du devoir de non-ingérence ou de non-intervention, j'emploierai les deux termes comme synonymes dans la suite de cet exposé.

Monsieur le Président, je n'aurai pas la cuistrerie de retracer ici l'histoire du principe de la non-intervention ; je crois qu'il suffit de relever que, déjà, les pères du droit international, et en particulier Vattel, affirmaient l'existence du principe, tandis que des auteurs comme Fauchille, dans son *Traité de droit international public* (Rousseau, Paris, 1922, p. 538 et suiv.) ou Stowell dans *Intervention in International Law* (J. Byrne and Co., Washington, 1921, p. 558), en faisaient la théorie bien avant l'interdiction du recours à la guerre en 1928, puis à la force, en 1945. Et, par exemple, l'arbitre Max Huber en a fait application dans son rapport sur les *Responsabilités de l'Etat dans les situations visées par les réclamations britanniques* en date du 1er mai 1925 (*RSA*, II, p. 641).

Cela montre que l'interdiction de l'ingérence trouve son fondement non pas dans la prohibition du recours à la force mais, comme l'a montré M. le président Jiménez de Aréchaga dans son cours général à l'Académie de droit international, à la fois, dans le principe de l'égalité souveraine des Etats, dans celui de leur indépendance et dans celui de l'autodétermination (« International Law in the Past Third of a Century », *RCADI*, 1978-I, n° 112).

6. L'ancienneté du principe de non-ingérence et la solidité de son ancrage dans les règles les plus fondamentales du droit des gens en font l'un des principes, sans aucun doute, les mieux établis du droit international contemporain, quelles que soient les violations dont il est trop souvent victime ; et c'est, sans aucun doute aussi, sur le continent américain que ce principe a trouvé le terrain privilégié de son épanouissement.

La Cour internationale de Justice l'a du reste relevé dans son arrêt du 20 novembre 1950, rendu dans l'affaire du *Droit d'asile*, lorsqu'elle a qualifié la non-intervention de : « l'une des traditions les mieux établies de l'Amérique latine » (*C.I.J. Recueil 1950*, p. 285), région dans laquelle elle a, en effet, été réaffirmée à d'innombrables reprises.

Il est vrai que, de ce principe, les Etats-Unis ont, pendant longtemps, eu une conception assez singulière, à travers leur double lecture de ce que l'on a appelé la doctrine Monroe, à la fois fondement de l'exclusion de toute intervention européenne dans l'hémisphère occidental, et justification de leurs propres interventions dans ce même hémisphère. Hésitants lors de la conférence de La Havane en 1928, les Etats-Unis n'en ont pas moins renoncé formellement à leur prétendu droit d'intervention en adoptant le protocole de Buenos Aires en 1936. Par la suite, et sans qu'il soit besoin d'entrer dans les détails, les Etats-Unis ont, à maintes reprises, proclamé leur attachement au principe de la non-intervention dont l'une des expressions les plus vigoureuses, et sans doute la plus convaincante, a probablement été donnée par le président Eisenhower dans une déclaration faite le 16 avril 1953 et que je ne peux résister à l'envie de citer :

> « Any nation's right to a form of government and economic system is inalienable. Any nation's attempt to dictate to other nations their form of government is indefensible » (*Department of State Bulletin*, vol. 28, 1953, p. 599.)

7. Il n'est pas sans intérêt de relever, en outre, l'attitude que les Etats-Unis eux-mêmes ont adoptée lors des travaux préparatoires de la résolution 2131 (XX) adoptée le 21 décembre 1965 et portant « Déclaration sur l'inadmissibilité de l'intervention dans les affaires intérieures des Etats ». Les Etats-Unis ont pris une part active à l'élaboration de ce texte, et, à l'occasion de ces travaux préparatoires, ils ont proposé un amendement, qui a finalement été abandonné, en vue de rappeler que le principe de non-intervention trouvait son fondement non seulement dans la Charte des Nations Unies, mais encore dans « les principes essentiels du droit coutumier » (cf. document A/C.1/L.350 et corr.1, 3 décembre 1965).

Si, lors de l'adoption de ce texte, le représentant des Etats-Unis a déclaré que son pays — qui a voté en faveur de la résolution — y voyait une déclaration d'intention politique et non une élaboration du droit (*Documents officiels de l'Assemblée générale*, 20^e session, première commission, comptes rendus analytiques des séances, p. 458), les Etats-Unis, en revanche, ont estimé que la célèbre déclaration 2625 (XXV) du 4 novembre 1970, dont le troisième principe reprend l'essentiel du texte de 1965, reflétait le droit existant, et était, en ce qui la concerne, une déclaration du droit ; cette position correspond d'ailleurs aux vues de la doctrine la plus autorisée, qu'il s'agisse de l'opinion de M. Jiménez de Aréchaga (*op. cit.*, p. 12 et 32), de l'opinion de M. Schwebel (« Aggression, Intervention and Self-defence in Modern International Law », *RCADI*, t. 136, 1972, p. 452) ou de celle de M. Louis Sohn (dans H.A.M. Bos, dir. publ., *The Present State of International Law*, 1973, p. 50).

Enfin, l'on peut mentionner en passant que, si les Etats-Unis ont voté contre la résolution 36/103 du 9 décembre 1981, portant «Déclaration sur l'inadmissibilité de l'intervention et de l'ingérence dans les affaires intérieures des Etats», les Etats-Unis ont expliqué leur vote par des motifs particuliers et non par un doute quelconque quant à la validité du principe tel que je l'analyse ici.

8. Ce très rapide survol permet de conclure, Monsieur le Président, me semble-t-il, qu'il *n'existe aucune* espèce de doute sur l'existence en droit international d'une règle coutumière interdisant l'ingérence des Etats dans les affaires intérieures des autres Etats dont la Cour a du reste reconnu la validité dans des termes particulièrement solennels que M. Chayes a rappelés hier dans l'affaire du *Détroit de Corfou*, sur laquelle, malgré tout, je serai conduit à revenir dans quelques minutes. En outre, dans son arrêt du 26 novembre 1984, la Cour a, de nouveau, souligné le caractère obligatoire du principe «en tant qu'élément du droit international coutumier» (*C.I.J. Recueil 1984*, p. 424). Ce principe existe; les Etats-Unis le reconnaissent; mais l'attitude de ce pays à l'égard de la non-intervention constitue un exemple typique de l'écart, dénoncé par M. le vice-président Guy de Lacharrière dans un article récent, entre «les mots et les conduites» (*Mélanges Charles Chaumont*, Pedone, 1984, p. 347-362). Et cela me conduit à ma deuxième proposition.

B. Les Etats-Unis ont, dans la présente espèce, violé de manière manifeste le principe de l'interdiction de l'intervention dans les affaires intérieures des Etats

9. S'il existe, Monsieur le Président, tant en doctrine que parmi les Etats, un accord unanime pour considérer que le principe de non-ingérence a une valeur coutumière indépendamment de son inclusion dans certains instruments conventionnels, l'incertitude est certainement plus grande en ce qui concerne la portée du principe de non-intervention que Quincy Wright a défini comme une «*zone nébuleuse*» du droit international («Non-Military Intervention», *Mélanges Leo Gross*, p. 5). Et force est de reconnaître que les résolutions des Nations Unies, que j'ai évoquées tout à l'heure, ne sont pas d'un très grand secours pour définir précisément ce qu'est la non-intervention; elles énumèrent des cas d'intervention illicites plus qu'elles n'en fournissent une définition générale. Les exemples que donnent ces résolutions mettent cependant en évidence les deux éléments sur lesquels, au-delà de leurs divergences, les auteurs les plus exigeants semblent d'accord. Pour que l'on puisse parler d'intervention, deux éléments doivent être réunis:

i) un ou des actes de contrainte doivent avoir été commis, ce que les Anglo-Saxons nomment une «dictatorial interference»; c'est, si l'on veut, le *corpus*;
ii) cet acte ou ces actes doivent avoir été commis en vue de plier leur destinataire — leur victime, pourrait-on dire — à la volonté de leur auteur; c'est l'*animus*.

> «C'est [comme l'écrivait Fauchille, auquel des auteurs aussi divers qu'Oppenheim, Fawcett, Sanders, Rousseau, Brownlie ou Ouchakov semblent faire écho] l'action exercée pour faire prévaloir une volonté étrangère sur la volonté propre d'un Etat. Les droits d'un Etat se trouvent ainsi restreints par le fait d'un autre Etat.» (*Op. cit.*, p. 539.)

Corpus et *animus* sont donc nécessaires.

10. Si l'on applique cette définition dans le différend qui oppose le Nicaragua aux Etats-Unis, il ne peut guère exister le moindre doute sur le fait que les conditions du délit international sont réunies. L'établir revient largement à revenir sur l'ensemble des faits de l'affaire. Et je ne retiendrai — d'ailleurs uniquement pour les mentionner en passant — que quelques-uns de ceux qui paraissent les plus topiques, étant entendu que le choix n'est pas aisé ; tous, ou presque, peuvent concourir à la démonstration.

11. S'agissant des objectifs poursuivis par les Etats-Unis — c'est-à-dire de l'*animus* —, ils ont été énoncés, avec ce dont on ne sait s'il faut le considérer comme de la naïveté ou du cynisme, par les plus hauts responsables de l'Etat. M. Chayes a rappelé mercredi la liste impressionnante des déclarations par lesquelles le président Reagan a manifesté publiquement et clairement son intention d'obliger le Gouvernement du Nicaragua à « dire pouce » (« to say Uncle »), selon l'expression qu'il a utilisée le 21 février 1985 (annexe C, pièce I-14). Bien d'autres officiels américains ont confirmé que le but des Etats-Unis était de renverser l'équipe actuellement au pouvoir à Managua ou de lui interdire de mener sur son territoire la politique qu'elle entendait suivre, d'entretenir avec les puissances étrangères les relations qui lui semblaient bonnes. Par exemple, le 27 juillet 1983, le président du Permanent Select Committee on Intelligence de la Chambre des représentants exprimait sa conviction selon laquelle les activités « secrètes » contre le Nicaragua avaient pour seul objet « to overthrow the Government of Nicaragua » (annexe E, pièce n° 3, H 5748). Le 29 janvier 1985, le secrétaire d'Etat adjoint pour les affaires américaines faisait une déclaration confirmant clairement que, de l'avis de l'administration américaine :

> « The Sandinistas can change their ways if the pressure to do so is clear ; throughout 1983 and into 1984, a variety of pressures — military exercises, naval manoeuvres, internal opposition (both armed and unarmed), falling international prestige — did produce some change ... » (Annexe C, pièce II-9, IV, p. 215.)

Et il ajoutait que, bien entendu, les Etats-Unis continueraient dans cette voie.

Les exemples peuvent être multipliés presque à l'infini et montrent avec la clarté de l'évidence qu'il s'agit, pour reprendre les termes mêmes figurant aussi bien dans la résolution 2131 (XX) que dans la déclaration 2625 (XXV), de menaces « dirigées contre la personnalité » du Nicaragua, ayant but et pour objet de contraindre celui-ci « à subordonner l'exercice de ses droits souverains » et de « changer son régime par la violence ». Il s'agit, à l'évidence, d'un « cas où une puissance estime mauvais le gouvernement ou la politique intérieure d'un autre Etat et entend les modifier selon ses propres vues », exemple que M. Rousseau tient pour le plus typique de l'intervention illicite (*Droit international public*, t. IV, « Les relations internationales », Sirey, 1980, p. 41).

12. L'*animus*, Monsieur le Président, il est vrai, ne suffit pas ; c'est, après tout, le droit le plus strict d'un gouvernement de manifester son inimitié à l'encontre de celui d'un autre Etat dont il désapprouve les options ; encore est-il, pour le moins, inhabituel de procéder d'une manière aussi véhémente, s'agissant d'un Etat avec lequel on entretient des relations diplomatiques normales et auquel on est lié par un traité d'amitié.

Mais force est de constater dans notre affaire que ces déclarations ne comportent pas seulement des critiques envers le Gouvernement du Nicaragua ; elles le menacent directement — et la seule menace est en elle-même un fait internationalement illicite — et, pis encore, elles annoncent ou elles reconnaissent que des actions en vue d'atteindre ces buts sont prévues ou sont en cours. Le *corpus delicti* s'en trouve du même coup établi.

13. Ces actions revêtent, à vrai dire, des formes extrêmement diverses. Et c'est d'abord la forme d'actions armées, d'actions d'intimidation perpétrées par les Etats-Unis eux-mêmes et sur lesquelles je ne pense pas qu'il soit utile de revenir ; si ces actions armées sont contraires au principe de non-intervention, elles le sont, avant tout, et de la façon la plus claire, au principe qui interdit le recours à la force et à la menace de la force.

De l'avis du Nicaragua, il en va de même des autres catégories d'actes qui visent à renverser le gouvernement actuel du Nicaragua ou à l'obliger, au moins, à changer sa politique intérieure ou extérieure. Pour surplus de droit, je m'arrêterai cependant quelques instants sur certaines actions des Etats-Unis qui entrent dans la catégorie de ce que l'on appelle souvent l'intervention indirecte et qui paraît, à vrai dire, surtout une intervention directe mais qui n'est pas ouvertement armée.

Dans cette affaire, les manifestations de ces interventions indirectes sont si nombreuses qu'il m'est apparu impossible d'en faire le recensement exhaustif. Je m'en tiendrai donc à deux catégories d'exemples : d'une part l'utilisation des mercenaires, d'autre part la contrainte économique.

14. Dans le long exposé des faits qu'ils ont soumis à la Cour, mes collègues Abram Chayes et Paul Reichler ont établi :

que les Etats-Unis ont conçu, créé et organisé une armée de mercenaires ;
qu'ils en ont armé, équipé et entraîné les membres ;
qu'ils lui ont fixé ses objectifs et sa stratégie ;
qu'ils en ont suscité, payé et contrôlé la direction politique.

Je ne reviens pas sur ces faits. Et les faits, à vrai dire, là encore, parlent d'eux-mêmes et imposent, sur le plan juridique, une conclusion incontournable : ils constituent des interventions caractérisées dans les affaires intérieures du Nicaragua.

Il ne paraît pas y avoir, sur ce point, de notes discordantes dans la doctrine (alors même que la doctrine est divisée sur le point inverse de savoir si un gouvernement en place peut bénéficier d'une assistance étrangère lorsqu'il est aux prises avec une insurrection, bien que la réponse dominante semble plutôt être positive). Fauchille voit dans cette forme d'intervention la forme « la plus dangereuse, parce qu'elle est sournoise et se cache, se fait au moyen d'agents qu'on envoie à l'étranger ou qu'on y recrute... » (*op. cit.*, p. 542), et cela en 1922, et M. le juge Schwebel approuve la résolution 2131 (XX) de disposer :

> « Tous les Etats doivent aussi s'abstenir d'organiser, d'aider, de fomenter, de financer, d'encourager ou de tolérer des activités armées, subversives ou terroristes, destinées à changer par la violence le régime d'un autre Etat, ainsi que d'intervenir dans les luttes intestines d'un autre Etat. » (S. Schwebel, *op. cit.*, p. 455.)

Ce texte de la résolution 2131 (XX) se retrouve dans son intégralité dans la résolution 2625 (XXV) et est assorti de précisions complémentaires dans la résolution 36/103.

Lors des travaux préparatoires de ce texte, les Etats-Unis en avaient du reste proposé une version plus explicite encore, puisqu'ils souhaitaient que soit condamnée :

> « toute intervention directe ou indirecte d'un Etat dans les affaires intérieures d'un autre Etat, que cette intervention comporte des attaques et une invasion armées ou le fait d'entreprendre, d'encourager ou d'appuyer des mouvements visant à renverser par la force le gouvernement d'un Etat indépendant, y

compris la formation et l'infiltration de personnel, l'encouragement à la subversion ou au terrorisme et la fourniture clandestine d'armes et d'autre matériel » (doc. A/C.1/L.350 et Corr.1; 3 décembre 1965).

Et le représentant américain à la première commission de l'Assemblée générale renchérissait encore en disant :

> « Une intervention illégale est plus grave que certaines attaques armées sur des frontières internationales. Tout aussi réelle, et peut-être plus dangereuse, est l'intervention sous forme d'encouragement insidieux à la guerre de guérilla, l'entraînement secret de bandes armées, et l'infiltration d'agents dont le but est de torturer et d'assassiner des innocents et d'imposer la volonté d'un autre gouvernement et une autre idéologie. » (*Documents officiels de l'Assemblée générale, vingtième session, Première Commission*, p. 264.)

Il y a là, Monsieur le Président, une description très exacte de la manière dont, vingt ans plus tard, les Etats-Unis se comportent vis-à-vis du Nicaragua... De même, lors des travaux préparatoires des déclarations 2625 (XXV) ou 36/103, les représentants des Etats-Unis se sont félicités que ces textes condamnent expressément les interventions indirectes, sous forme notamment « de l'organisation de bandes armées en vue d'incursions sur le territoire d'un autre Etat et des actes destinés à encourager la guerre civile et le terrorisme dans d'autres pays » (ceci est la déclaration du représentant des Etats-Unis devant le comité spécial des principes du droit international touchant les relations amicales et la coopération entre les Etats en 1970) (*Documents officiels de l'Assemblée générale, vingt-cinquième session, supplément n° 18* (A/8018), p. 129; voir également A/CM/PV.5, 29 décembre 1981, p. 55).

Monsieur le Président, le Nicaragua, dans ses écritures, aussi bien qu'à cette barre, a amplement démontré que les Etats-Unis, loin de s'être bornés à tolérer les activités de la *contra*, les avaient au contraire encouragées, contrôlées, mises au point, dirigées. Ce n'est donc que pour surplus de droit que j'ajoute qu'il est généralement admis qu'une obligation internationale pèse sur tout Etat, non seulement de ne pas encourager de tels actes, mais encore de les faire cesser des auteurs, pour prendre des auteurs relativement anciens, comme Stowell (*op. cit.*, p. 347) ou Quincy Wright (*op. cit.*, p. 532, et « Recognition, Intervention and Ideologies », *Indian Yearbook of International Affairs*, 1958, p. 99), le précisent clairement et, par exemple, l'article IX du projet de déclaration, préparé par le comité juridique interaméricain de 1962, dispose :

> « L'Etat est responsable s'il donne son aide aux éléments qui conspirent sur son territoire ou à l'étranger contre un gouvernement ou un autre Etat ou fomentent des mouvements d'hostilité à ce dernier ; il en sera de même si ledit Etat ne prend pas toutes les mesures possibles légalement pour éviter la survenance de telles situations. » (*Annuaire de la Commission du droit international*, 1969, II, p. 159-160.)

Ainsi, Monsieur le Président, il ne peut faire de doute qu'« en recrutant, formant, armant, équipant, finançant, approvisionnant, et en encourageant, appuyant, assistant et dirigeant » les activités de la *contra*, pour reprendre les termes de la requête du Nicaragua, en donnant un appui ouvert à la collecte de fonds publics ou privés sur son territoire en faveur des contre-révolutionnaires, en fournissant eux-mêmes une base aux activités de la *contra*, les Etats-Unis ont agi en contradiction avec le principe de la non-intervention, tel qu'eux-mêmes l'interprètent.

L'audience est suspendue de 11 h 33 à 12 h 12

Monsieur le Président, avant la pause, j'avais abordé le problème de l'intervention « indirecte » dans les affaires intérieures du Nicaragua et j'avais évoqué le problème du financement et de l'utilisation de mercenaires.

15. Le second exemple des interventions des Etats-Unis dont on se demande si l'on doit vraiment les qualifier d'« indirectes », tant elles sont ouvertes, reconnues et même revendiquées par ce pays, est celui des pressions que les Etats-Unis exercent sur l'économie du Nicaragua et qui viennent s'ajouter aux destructions des industries, des récoltes et des installations de stockage de ce pays, qui sont infligées sur le terrain soit par les Etats-Unis eux-mêmes, soit sur leur ordre et avec leur aide indispensable.

Ces pressions économiques ont revêtu des formes diverses qui ont été décrites devant vous par M. le ministre William Huper dans sa déposition de mardi dernier et que j'ai évoquées dans mon précédent exposé sur les violations du traité d'amitié, de commerce et de navigation du 21 janvier 1956. Il suffit de rappeler que ces pressions se sont traduites entre autres par les faits suivants :

premièrement, l'arrêt brutal de toute aide économique et financière au Nicaragua en avril 1981 ;

deuxièmement, la réduction de quatre-vingt-dix pour cent du quota des importations de sucre du Nicaragua en avril 1981 ;

et bien sûr, l'embargo, décidé le 1er mai 1985, sur l'ensemble du commerce en provenance ou en direction du Nicaragua.

En elles-mêmes, considérées hors de leur contexte, certaines de ces mesures peuvent être licites. On peut admettre qu'un Etat peut aider ou ne pas aider qui bon lui semble ; on peut admettre qu'un Etat peut commercer ou ne pas commercer avec qui bon lui semble ; et ce n'est qu'« en passant » que je relèverai qu'un groupe spécial du GATT, saisi à la demande du Nicaragua, a conclu qu'en attribuant au Nicaragua un contingent d'importations de sucre inférieur de près de quatre-vingt-dix pour cent à leurs engagements les Etats-Unis « n'avaient pas respecté les obligations qui découlent pour eux de l'accord général et, en particulier, de l'article XIII, paragraphe 2, de cet accord (ce rapport du GATT a été publié le 2 mars 1984 sous la cote L 5607). Ce n'est qu'en passant que j'indiquerai que le Nicaragua a également saisi les parties contractantes du GATT de la compatibilité des mesures d'embargo commerciales adoptées par le président des Etats-Unis le 1er mai 1985 avec les dispositions du GATT, et que cette plainte est actuellement sous examen. Ce n'est aussi que « pour mémoire » que je rappellerai que ces mesures, dans leur ensemble, ne sont compatibles ni avec la lettre ni avec l'esprit du traité de 1956.

Mais indépendamment de ces illicéités, qui atteignent ces mesures de contrainte économique prises individuellement, tous ces faits, pris ensemble, constituent en outre une atteinte systématique au principe fondamental de la non-intervention dans les affaires intérieures du Nicaragua.

Ce n'est pas le lieu, Monsieur le Président, d'exposer, moins encore de prendre parti, dans les querelles doctrinales relatives à la licéité des mesures de contrainte économique « dans l'abstrait ». Pour mon propos, adoptant la même démarche que celle que j'ai suivie tout à l'heure pour définir la non-intervention, je pense qu'il suffit de prendre pour point de départ le point de vue extrêmement restrictif adopté dans un très récent article publié dans l'*American Journal of International Law*, par M. Tom J. Farer, qui considère — je lui laisse entièrement la responsabilité de ces vues — que « la coercition n'a rien d'illégal » (« there is nothing illegal about coercion », *AJIL*, 1985, p. 406), notamment en ce qui concerne la coercition économique ; mais, tout à la fin de cet article, qui n'est qu'une démonstration de cette proposition, l'auteur est conduit à nuancer ainsi cette opinion :

> « In defining economic aggression, I myself would be willing to go no further than treating economic coercion as aggression when, and only when, the *objective* of the coercion is to liquidate an existing State or to reduce that State to the position of a satellite. There must, moreover, be a connection between the attempt at coercion and the realization of its objective.» (*AJIL*, 1985, p. 413.)

Cette vue très restrictive reflète d'ailleurs les règles minimales posées par les résolutions 2131 (XX) et 2625 (XXV) de l'Assemblée générale dont, comme je l'ai indiqué, l'on s'accorde à reconnaître qu'elles codifient le droit existant. En particulier, la résolution 2131 (XX) dispose :

> « Aucun Etat ne peut appliquer ni encourager l'usage de mesures économiques pour contraindre un autre Etat à subordonner l'exercice de ses droits souverains et pour obtenir de lui des avantages de quelque ordre que ce soit.»

Et la résolution 31/91 du 14 décembre 1976, qui précise ce principe, inclut, dans les mesures économiques constituant des cas d'intervention dans les affaires intérieures des Etats, le refus d'assistance ou la menace du refus d'assistance lorsqu'ils sont inspirés par la volonté d'exercer une pression sur le gouvernement bénéficiaire de l'aide ou qui est privé de l'aide.

En d'autres termes, les règles que je viens de rappeler établissent de nouveau l'interdépendance étroite entre le *corpus* et l'*animus* que j'évoquais tout à l'heure pour donner ce que l'on peut considérer comme la définition minimale de l'intervention illicite en droit international. Un fait — par exemple, l'arrêt de l'assistance économique à un Etat —, peut être licite en lui-même, mais il devient une violation du principe de non-intervention s'il est commis dans l'intention de porter atteinte au droit souverain et à la liberté d'action de l'Etat partenaire.

Toutes les conditions, Monsieur le Président, sont donc réunies pour considérer que les mesures de coercition économique décidées et appliquées par les Etats-Unis contre le Nicaragua remplissent ces conditions et s'analysent dès lors comme autant de violations du principe de non-ingérence. Et ceci, sans qu'il soit besoin de prendre parti sur la question de la licéité de telles mesures dans d'autres circonstances et en ne retenant que la définition la plus étroite de la non-intervention.

C. Les violations du principe de non-intervention par les Etats-Unis ne peuvent être dissociées de manquements graves à d'autres principes du droit international qui en sont la conséquence

16. J'en arrive à ma troisième proposition, que j'aborderai de façon extrêmement brève, elle est la suivante : les violations du principe de non-intervention par les Etats-Unis ne peuvent pas être dissociées ici de manquements graves à d'autres principes du droit international qui en sont la conséquence. De l'exposé oral qu'il a présenté à la Cour dans l'affaire du *Sahara occidental*, l'éminent juriste qui n'était pas encore le juge Bedjaoui rappelait que la première fonction du principe de l'autodétermination était « d'exclure toute forme d'ingérence dans les affaires intérieures des nations » (*C.I.J. Mémoires*, vol. IV, p. 497), principe que formulent du reste les déclarations 2131 (XX) et 2625 (XXV) de l'Assemblée générale.

Et, à l'inverse, il paraît tout aussi évident qu'une intervention extérieure dans les affaires d'un Etat visant à obtenir de celui-ci qu'il renonce à ses options idéologiques, à ses choix politiques, économiques et sociaux est incompatible avec le principe de l'égalité de droits des peuples et de leur droit à disposer d'eux-mêmes proclamés dans la Charte des Nations Unies elle-même et rappelés par les deux pactes internationaux des droits de l'homme de 1966, pactes dont l'article premier dispose :

> « 1. Tous les peuples ont le droit de disposer d'eux-mêmes. En vertu de ce droit, ils déterminent librement leur statut politique et assurent librement leur développement économique, social et culturel. »

En menant des activités militaires et paramilitaires au Nicaragua et contre celui-ci, en entretenant une guerre extérieure dont l'objet est précisément de changer par la force le régime existant, les Etats-Unis vident cette norme fondamentale — souvent considérée comme une règle de *jus cogens* — de toute substance.

17. Du même coup ils contreviennent à cet autre principe, corollaire du précédent, qu'exprime le paragraphe suivant de l'article premier des deux pactes de 1966, garantissant à chaque peuple le droit de disposer librement de ses richesses et de ses ressources naturelles. En menant et en entretenant une guerre économique les Etats-Unis s'efforcent, en contradiction de nouveau avec les termes mêmes de l'article premier, paragraphe 2, des deux pactes de 1966, de priver le peuple nicaraguayen « de ses propres moyens d'existence ».

18. Du même coup aussi, ils le privent de son droit au développement dont, dans maints écrits, et en particulier dans sa contribution aux *Etudes en l'honneur du juge Manfred Lachs* (p. 163-177), M. le juge Mbaye a montré qu'il constituait non seulement un idéal éthique, mais bien une institution juridique, qui trouve son fondement précisément dans le droit des peuples à disposer d'eux-mêmes.

Rapportées aux faits, Monsieur le Président, ces considérations très rapides me paraissent suffire à établir que les violations du principe de non-intervention lui-même, sur lesquelles je me suis attardé davantage, constituent aussi, par le seul fait qu'elles sont commises, des manquements à d'autres règles tout aussi fondamentales du droit international de ce temps.

D. Les violations du principe de non-intervention par les Etats-Unis n'ont aucune justification

19. J'aborde pour terminer, en quelques minutes très brèves, ma quatrième proposition qui est la suivante : les violations du principe de non-intervention par les Etats-Unis n'ont aucune justification.

20. La doctrine s'interroge fréquemment sur la question de savoir si certaines catégories d'interventions, en elles-mêmes et du seul fait qu'elles poursuivent des objectifs conformes au droit international, ne sont pas licites.

Il est à peine besoin de citer ici les deux exceptions les plus fréquemment mentionnées :

> l'intervention dite d'« humanité » en vue de protéger les ressortissants de l'Etat qui intervient ;
> l'intervention « consentie », c'est-à-dire celle qui est menée à la demande du gouvernement sur le territoire duquel elle a lieu.

Il n'a pas été allégué dans notre affaire — et il ne pouvait pas être allégué — que la sécurité des citoyens des Etats-Unis au Nicaragua soit menacée de quelque manière que ce soit — si ce n'est, comme l'a rappelé l'agent du Nicaragua au début de cette session, par les activités de la *contra* mais... *nemo auditur propriam turpitudinem allegans*... Quant à une demande émanant des autorités du Nicaragua est-il besoin de préciser que le gouvernement de ce pays n'a pas vraiment jugé bon de demander à celui des Etats-Unis de miner ses ports, de bombarder ses installations pétrolières, de fomenter artificiellement une rébellion qui mobilise ses forces vives, etc.

Il est vrai qu'à ces deux hypothèses d'interventions, dont il est quelquefois allégué qu'elles sont licites, s'en ajoute une troisième qui résulte de nombreuses résolutions des Nations Unies appelant tous les Etats à apporter leur appui aux peuples en lutte contre une domination coloniale ou étrangère ou contre un régime raciste. Décolonisé en 1821, ne pratiquant aucune forme de discrimination raciale, le Nicaragua, s'il est occupé — très partiellement d'ailleurs —, ne l'est que par les forces mercenaires contrôlées et dirigées par les Etats-Unis.

21. Dans une note parue l'an dernier, M. Oscar Schachter estime qu'admettre le droit pour un Etat d'intervenir à l'étranger pour rétablir ce qui lui paraît la vraie démocratie

> « would introduce a new normative basis for recourse to war that would give powerful States an almost unlimited right to overthrow governments alleged to be unresponsive to the popular will or the goal of self-determination » (*AJIL*, 1984, p. 649).

A trente-cinq ans de distance, le professeur de New York fait écho à ce que disait Pierre Cot devant votre haute juridiction dans l'affaire du *Détroit de Corfou* : « La théorie de l'intervention n'est pas autre chose que la raison du plus fort appliquée aux affaires internationales. » (*C.I.J. Mémoires*, p. 405.)

Ces vues, la Cour, dans son arrêt de 1949, les a pleinement partagées. Le professeur Chayes en a cité le passage pertinent et je ne pense pas qu'il soit utile de le lire de nouveau, sauf pour rappeler que la Cour a considéré que « les formes d'intervention qui lui étaient soumises étaient d'autant plus inacceptables qu'elles étaient réservées par la nature des choses aux Etats les plus puissants » (*C.I.J. Recueil 1949*, p. 35).

Cet avertissement, les Etats-Unis ne l'ont pas entendu. Ils ne se sont imposés aucun frein, aucune limite ; leur bon plaisir leur a tenu lieu de règle ; leur puissance leur a tenu lieu de droit, alors même, comme la Cour l'a rappelé il y a trente-cinq ans, que cette puissance leur imposait des obligations spéciales d'agir avec modération.

La diversité des manifestations d'interventions des Etats-Unis dans les affaires du Nicaragua, leur nombre, leur gravité me paraissent conduire, Monsieur le Président, aux deux constatations suivantes :

i) d'abord, considérée isolément, prise en elle-même, chacune de ces interventions — et je n'en ai donné que quelques exemples — est contraire au principe de la non-ingérence ;

ii) ensuite, la concordance de ces interventions illicites qui, d'évidence s'intègrent dans un plan concerté, délibéré, d'intimidation et de pressions, impose cependant de sortir du cadre étroit du droit de la non-intervention au sens strict, car au fond, Monsieur le Président, c'est tout le droit international ou presque qui est en cause dans cette affaire et c'est ce que le professeur Brownlie montrera, si vous voulez bien lui donner la parole, avant la conclusion finale de M. l'agent du Nicaragua. Auparavant, je souhaite renouveler, Monsieur le Président, à vous-même et à la Cour, l'expression de ma vive gratitude pour votre bienveillance.

ARGUMENT OF PROFESSOR BROWNLIE

COUNSEL FOR THE GOVERNMENT OF NICARAGUA

Professor BROWNLIE: Mr. President and Members of the Court. May it please the Court.

The purpose of my second speech in these proceedings is to provide a survey of the issues concerning the claims based upon general international law.

I do not expect to be on my feet for very long, because in general the issues concerning general international law probably do not present many difficulties.

However, there are certain points which I would like to draw to the attention of the Court, partly on account of their intrinsic merit and partly in order to emphasize the role of the causes of action founded upon general international law. The economy of formation of the rules of customary law leads to a certain disparity in the space needed for their exposure in contrast to that required to give an account of the many treaty-based obligations which are relevant to this case.

Whilst I may be in danger of stressing the obvious, I would like to stress that the Applicant State considers that the claims based upon customary or general international law are no less important than the treaty-based claims, and their importance is not prejudiced by the order of topics which has, of course, been adopted as a matter of convenient presentation.

THE ROLE OF THE CUSTOMARY LAW CLAIMS IN THE PRESENT CASE

The customary law claims may be seen to play two roles in the proceedings. In the first place, the heads of claim or causes of action of customary law reinforce and complement the claims based upon treaty obligations.

This complementary relationship exists in a variety of forms, and it will be sufficient if I offer some examples to the Court.

The obligation not to use force or the threat of force, as it exists in general international law, reinforces the provisions of the United Nations Charter. Indeed, there is an historical and functional interaction, since the norm of general international law antedates the provisions of Article 2 of the Charter; but at the same time the principle formulated in paragraph 4 of Article 2 has in itself provided new cement for the rule of general international law. As Nicaragua has indicated in its Memorial (**IV**, pp. 118-119, paras. 453-455), there is substantial authority for the view that the principles contained in Article 2 of the Charter form part of the customary law.

This complementarity between custom and treaty is also a characteristic of the principle of non-intervention. As in the case of the principles concerning the use of force, over a long period there has been a normative interaction, so that the transposition of the principle of non-intervention as between customary law and treaty provisions produces a process of mutual reinforcement and confirmation.

This complementary role played by the customary law causes of action does not stand alone, since customary law has an internal logic and versatility, which is characteristic of norms which grow out of actual experience. In addition, the rules of general international law supplement the rules derived from treaties.

Thus the customary law claims are not based exclusively upon the concept of the use or threat of force. Thus also the cause of action denominated "violations of the sovereignty of Nicaragua" is by no means confined to, though it certainly includes, episodes which involve the use or threat of force.

A further example, and, I submit, a particularly striking one, is provided by the obligation not to infringe the freedom of the high seas or to interrupt peaceful maritime commerce which is generally recognized as a facet of general international law. On the hypothesis that the provisions of the Treaty of Friendship, Commerce and Navigation of 1956 were held to be inapplicable to the mining of Nicaraguan ports, this principle stands independently available.

THE CAUSES OF ACTION

Having affirmed the importance of customary law in these proceedings, I can now turn to the individual heads of claim.

(a) *Violations of the Sovereignty of Nicaragua*

Perhaps the most traditional and certainly the most comprehensive cause of action consists of the category of violations of the sovereignty of Nicaragua. Whilst many serious violations of the sovereignty of a State entail the use of force, this is by no means a necessary condition of responsibility. Indeed, the indispensable condition for this type of illegality is the actual exercise of some sovereign, that is State, function, within the sphere of sovereignty of another State, including its territorial sea and air space, without that State's consent. The prime characteristic is what a common law lawyer would describe as a trespass — a wrong to personality. It is the sovereign right of every State to determine the acts that will be performed within its territory. These qualities are evident from the practice of States which is referred to in Nicaragua's Memorial (**IV**, pp. 116-117). They are also very closely recorded in the pertinent entry in the work edited by Jules Basdevant, *Dictionnaire de la terminologie du droit international*, 1960, page 576 (letter G).

A particular characteristic of this cause of action is that it generates responsibility without proof of actual damage or loss. Or, to express the matter differently, the intrusion or usurpation of the jurisdictional sovereignty of the applicant State is itself a delict, and a duty of reparation arises even apart from proof of material damage, harm to citizens, or economic loss.

In sum, the violation of sovereignty as a cause of action has more than one function. In its major role it provides an extensive basis for responsibility, encompassing armed attacks against the territory of Nicaragua and forcible incursions into Nicaraguan waters. At the same time the category applies to cases of aerial trespass, whether or not the particular reconnaissance or other type of operation could be said to involve the use of force or of armed force.

(b) *Breaches of the Obligation not to Use Force or the Threat of Force*

I shall move on to what is surely the most significant and the most appropriate cause of action, that is the breaches by the United States of the obligation not to use force or the threat of force against the territorial integrity or political independence of Nicaragua. This obligation existing in general international law is substantially identical with the principle incorporated in Article 2, paragraph 4, of the United Nations Charter.

The rule is formulated in such a way as to extend to all forms of armed force, including minor uses of force. In addition, there can be no doubt whatsoever that the rule applies to all cases in which military operations are carried out by forces under the control of a State and acting as its agents.

In the present case there is an extensive pattern of evidence of breaches on the part of the United States of the customary law obligation not to resort to the use or threat of force against the territorial integrity or political independence of any State.

A high proportion of the evidence presented by Nicaragua relates to the persistent and systematic activities of the United States and its agents, involving armed attacks, sabotage operations, and multiple tactics of coercion and the propagation of terror among the civilian population of Nicaragua.

Mr. President, I would point to the content of that remarkable public document, the *Report of the Permanent Select Committee on Intelligence of the House of Representatives*, dated 13 May 1983 (Memorial, Ann. E, Att. 1). This authoritative and substantial document describes the *modus operandi* of the military and paramilitary operations in Nicaragua by mercenaries acting under the direction and control of the United States. The implication of its terminology, the phrases used in this report could not be clearer.

The document refers to "hostilities" (**IV**, p. 245), and to "direct or indirect support of military or paramilitary activities in Nicaragua" (*ibid.*). Moreover, as the Memorial points out (at **IV**, p. 117), given that the report is concerned with an amendment to the Intelligence Authorization Act for the Fiscal Year 1983, it necessarily describes the purposes of the funding existing at that time as the background to an attempt to place constraints upon what the report describes as "United States support for military or paramilitary operations in Nicaragua".

The picture of United States direct involvement in and control over the operations with which the Application is concerned in this case is confirmed by the documentary record in general, by the evidence of the witnesses called by the Applicant State, by the public statements of leaders of the mercenary forces, and also by the Edgar Chamorro affidavit.

The use of force has taken a variety of forms appropriate to the political convenience of the United States and to the specific purpose of the operations. The operations have two specific purposes, which are interrelated. The first is to coerce the Government of Nicaragua into acceptance of the political demands of the United States, and the second is, quite simply, the overthrow of the Government of Nicaragua by means of an orchestra of armed attacks, terrorist actions in the countryside, economic sabotage, interference with foreign trade, and military and naval demonstrations and manœuvres.

This orchestra of instruments of coercion involves systematic and persistent breaches of the obligation not to use force or the threat of force against the territorial integrity or political independence of Nicaragua. Each instrument is directed against the territorial integrity of Nicaragua and, given the overall aim of coercion, it is also directed against the country's political independence.

The threat of force is a significant aspect of this case, Mr. President, and some of the instruments in the orchestra of coercion are versatile. Thus the killing of civilians has the double purpose of interfering with the coffee harvest, thus directly causing economic damage, and at the same time bringing general pressure to bear upon the Government, in order to force it, in Mr. Reagan's memorable phrase, to "say Uncle".

In relation to the threat of force, I would respectfully draw the attention of the Court to the helpful commentary on this phrase provided by Eduardo Jiménez de Aréchaga, in his "General Course" at the Hague Academy. In his opinion:

> "A threat of force is, for instance, the previous announcement of an act of violence, such as an ultimatum announcing recourse to military measures if certain demands are not accepted. A threat of force could also be implicitly conveyed by certain acts such as 'a demonstration of force for the purpose of exercising political pressure', the sudden concentration of troops in a border area in a situation of existing border dispute, or a display of force by means of warships close to the coasts of another State. A general mobilization could, in the context of a serious dispute, constitute a threat of force. On the other hand, an intensification of armaments in general might not be looked upon as such a threat." (*Recueil des cours*, Vol. 159 (1978-I), p. 88.)

The threat of force is one of a variety of forms of pressure employed against Nicaragua.

One of the instruments of coercion has been the mining of Nicaragua's harbours, again with the double purpose of inflicting direct loss upon the economy by deterring foreign trade and at the same time contributing to the general policy of coercion directed against the Government of Nicaragua. This brings me to the head of claim in respect of:

(c) *Breaches of the Obligation not to Infringe the Freedom of the High Seas or to Interrupt Peaceful Maritime Commerce*

This obligation is well recognized in the sources of the law and these have been referred to in detail in the Memorial (**IV**, pp. 122-124). One of the precedents may be recalled for present purposes. I refer to the British Note dated 9 December 1946 delivered to the Albanian Government in the aftermath of the mining of British warships in the North Corfu Strait. On the question of principle the Note had this to say:

> "19. His Majesty's Government must accordingly conclude that the Albanian Government either laid the minefield in question or knew that it had been laid. The Albanian Government has thus committed a flagrant breach of International Law. Under Articles 3 and 4 of the 8th Hague Convention of 1907 any Government laying mines in war-time, and *a fortiori* in peace, is bound to notify the danger zones to the Governments of all countries. (This obligation in fact applies even if the zones in question are not normally used by shipping.) Not only have the Albanian Government never made any public notification of this minefield but they have also made no comment on the continued issue of the relevant [Medri] charts and pamphlets. They thus endorsed a clear statement by the recognized international authority concerned in the shipping of the world that the Channel was safe for navigation. As a result, two of His Majesty's ships have been seriously damaged and forty-four innocent lives have been lost. Moreover, this conduct on the part of the Albanian Government menaced with destruction shipping of any kind using a Channel which is a normal and recognized route for international navigation."

It can be seen that this passage does not relate the responsibility exclusively to the status of the North Corfu Channel as an international strait. And the Note appears to represent what might be called the normal view of the United States Government on the point of principle, since that Note is given prominence in the *Digest of International Law* published by the Department of State and prepared under the direction of Marjorie Whiteman, then Assistant Legal Adviser (see Vol. 4 (1965), pp. 447-452).

Mr. President, the mining programme, which lasted from January until April of last year, is a remarkable example of irresponsible action by a major power. It was inevitably indiscriminate and could not qualify as collective self-defence even if such title of justification were applicable *in limine*. As a policy it was indefensible, and indeed it was not defended.

The responsibility of the United States was unequivocally recognized in a series of admissions, including admissions:

by President Reagan, who described the episode as "much ado about nothing" at the interview on 28 May 1984 (Memorial, Ann. C, I, 6, **IV**, p. 176);

by George Lauder, speaking on behalf of the CIA on 16 April 1984 (Ann. C, II, 5); and

by a Department of State spokesman on 10 May 1984 (Ann. C, II, 6, **IV**, p. 209).

And it is not surprising that a number of governments protested to the United States when the authorship of the mining programme became apparent (see Memorial, **IV**, p. 125).

Before I leave the issue of mining, with your permission, Mr. President, I shall indicate the precise legal consequences of the mining, which are surely threefold.

First, the mining operations involved persistent violations of the sovereignty of Nicaragua and thus generate responsibility even in the absence of proof of material loss or damage.

Second, there was specific damage to Nicaraguan shipping. Some of this damage was inflicted during mine-clearing operations undertaken by Nicaragua. However, in principle, such loss must be recoverable as an inevitable and natural consequence of the original wrongdoing. It may be recalled that the Canadian Statement of Claim concerning the consequences of the intrusion of the Cosmos 954 satellite into Canadian airspace included the cost of removing the potentially hazardous debris resulting from its disintegration (see 18 *International Legal Materials* (1979), p. 899 at p. 902; and also at p. 909).

Third, and cumulatively, the minings caused loss to the economy of Nicaragua consequential upon the interference with maritime commerce.

So much for the mining programme. I have now reached the penultimate of the causes of action based upon general international law which form part of my agenda, and that is:

(d) *Breaches of the Obligation not to Kill, Wound or Kidnap Citizens of Nicaragua*

It has been pointed out in the Memorial (**IV**, p. 126) that the legal bases of this claim consist of a wealth of jurisprudence of claims commissions and instances of State practice. In any case, quite apart from precedent and practice, this particular cause of action has a strong logical provenance, in that the duty which a State owes to aliens within its territory must apply with equal force to the persons of other nationalities affected by the operations of forces controlled and directed by the respondent State, whether within or without its frontiers.

Moreover, the military and paramilitary operations for which the United States has accepted responsibility have characteristics of particular relevance in the present context. No state of belligerency is acknowledged by the United States and the responsible officials have not once stated that the humanitarian law of warfare applies. If that view be correct, then the normal standards of State responsibility must remain applicable. Covert operations in the absence of the normal conditions of beligerency amount to nothing more than State-directed terrorism. The Court has been presented with a great deal of evidence of the planning and the execution of a programme of assassination and terror in the Nicaraguan countryside by forces under the control of the United States and I do not intend to rehearse the material at this juncture.

The last of the causes of action based upon customary law consists of:

(e) *Breaches of the Principle of Non-intervention*

My colleague, Professor Pellet, has described the status and scope of the principle in some detail and my purpose is confined to indicating the role which the principle has in the general economy of Nicaragua's case.

In a general way, the evidence of the breaches of the principle of non-intervention is identical with the evidence which is material in relation to violations of sovereignty and breaches of the obligation not to resort to the use or threat of force.

However, the principle of non-intervention has a specific role to play in certain respects and these can be indicated briefly and partly by way of memorandum.

First, the principle of non-intervention is more extensive than the concept of the use of force and this is particularly true of acts of "dictatorial interference", some of which may not fall easily or at all within the categories of "armed attack", the "use of force", or the "threat of force".

Second, intervention, both when it overlaps with the use of force and also when it extends beyond that category, has its classical field of application in relation to coercive action which has the purpose of overthrowing the lawful government of another State.

The relevant documentary evidence in the present case reveals that effectively all of the military and paramilitary activities aimed at the Government and people of Nicaragua have one of two purposes, which are compatible and can exist and be implemented in combination:

(a) The actual overthrow of the existing lawful Government of Nicaragua and its replacement by a government acceptable to the United States; and

(b) the substantial damaging of the economy, and the weakening of the political system, in order to coerce the Government of Nicaragua into the acceptance of United States policies and political demands.

The third and final particular characteristic of the category of intervention which I would like to mention, is of special relevance to the present case. The purpose of self-defence, and necessarily also of collective self-defence, has nothing in common with the general political objectives of the United States in Central America and nothing in common with a policy of dictatorial interference in the internal affairs of the applicant State. Thus the mining of ports and a policy of terror against Nicaraguan citizens are methods which have much in common with a policy of intervention but nothing in common with the concept of self-defence.

By way of bringing this survey of the causes of action to a conclusion, with your permission, Mr. President, I would remind the Court of the Final Act of the Helsinki Conference of 1975 (see Brownlie, *Basic Documents on Human Rights*, 2nd ed., p. 320; *International Legal Materials*, Vol. 14 (1975), p. 1292).

This instrument, of course, refers to European issues of concern but its 35 adherents include the United States, and the Final Act contains, and indeed gives special prominence to, a "Declaration on Principles Guiding Relations between Participating States". In the preamble to this Declaration one of the recitals reads as follows:

> "Expressing their common adherence to the principles which are set forth

> below and are in conformity with the Charter of the United Nations, as well as their common will to act, in the application of these principles, in conformity with the purposes and principles of the Charter of the United Nations . . ."

There follow ten principles. Nearly all of these have some relevance to the facts of the present case, but the more material items are as follows:

First: respect for sovereign equality;
Second: refraining from the use or threat of force;
Third: the territorial integrity of States;
Fourth: non-intervention in internal affairs; and
Fifth: respect for human rights and fundamental freedoms.

The text of the second principle is of special significance, since it concerns the use of force. It is carefully drafted, thus:

> "The participating States will refrain in their mutual relations, as well as in their international relations in general, from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations and with the present Declaration. No consideration may be invoked to serve to warrant resort to the threat or use of force in contravention of this principle.
>
> Accordingly, the participating States will refrain from any acts constituting a threat of force or direct or indirect use of force against another participating State. Likewise they will refrain from any manifestation of force for the purpose of inducing another participating State to renounce the full exercise of its sovereign rights. Likewise they will also refrain in their mutual relations from any act of reprisal by force.
>
> No such threat or use of force will be employed as a means of settling disputes, or questions likely to give rise to disputes, between them."

Mr. President, it is obvious that the Final Act is not a treaty and is not as such a legally binding text. But the part of the Final Act to which I have given emphasis is clearly intended to be declaratory of existing principles of general international law.

This part of the Helsinki Final Act thus stands as evidence of the status of the principles concerned as general international law and also as evidence of the adherence of the United States to those principles as formulated in the Final Act. This aspect of the instrument has been noted by Ouchakov in his contribution to the *Essays in Honour of Judge Manfred Lachs* published last year (pp. 217-233), and indeed it is evident from the preamble of the Declaration of Principles. The same Declaration is included in the *Digest of United States Practice in International Law*, 1975, page 7, under the rubric "Rights and Duties of States".

The Relation Between the Causes of Action Based upon Customary Law

In conclusion I shall make some very tentative points about the relationship of the various causes of action or, if you will, heads of liability. The issues with which I am now concerned will be evident if I state some propositions.

First: it may be assumed that if the Applicant State succeeds on all or any one of the customary law causes of action, the consequence will be full recovery of compensation for all losses, both direct and consequential.

Second: there are certain exceptions to the first proposition, which are probably as follows:

(i) in the case of the minings the compensation would reflect only that loss and damage which flowed from the minings; and
(ii) in the case of unlawful killing, wounding and kidnapping of Nicaraguan citizens the claim is, so to speak, mixed, consisting partly of a claim by way of diplomatic protection on behalf of the nationals involved and partly of a claim for consequential loss to the economy of Nicaragua.

Third: in the case of the violations of the sovereignty of Nicaragua, reparation is in principle due without proof of material loss (but this of course is without prejudice to this claim providing a foundation for the general claim of Nicaragua for compensation due).

These propositions, which are now concluded, are to a degree premature, since the Court has been formally requested to deal with the general issue of compensation in a subsequent phase of the proceedings. However, the prematurity is deliberate and, it is submitted, inevitable, since, when the Court is considering the issues of responsibility as such, it may be necessary, at least in a preliminary way, to bear in mind the logical interaction between the different heads of liability and certain specific questions of compensation.

The points I have just made concerning this logical interaction are provisional and intended simply to indicate the existence of certain types of question.

In making such points, it is not supposed that the existence of various heads of liability side by side is an inevitable source of complications. Nor is the multiplicity of grounds of claim to be regarded as artificial or in any way unusual. The various legal systems of the world are perfectly familiar with this phenomenon, and it is reflected in the pages of the *International Encyclopaedia of Comparative Law* (see Vol. XI, *Torts* (ed.), Tunc., Chap. 12). The resort to multiple grounds of claim is entirely natural since the various causes of action reflect two important aspects of reality.

One form of reality is the recognition which the law, both customary and conventional, gives to the various priorities of States, marking out the areas of intolerable conduct and giving substance to social standards.

The other form of reality is the delictual topography of this case. The various grounds of claim invoked by Nicaragua provide an economical and yet very clear picture of the orchestra of instruments of coercion — the conduct of which complaint is made to this Court, and thus the Application is a natural reflection both of the facts and of the realism which lies behind the causes of action found in general international law.

Mr. President, that concludes my consideration of, as it might be, the tactical role of the causes of action based on general international law. And now by way of an envoie I want to look at a separate question: this is the final speech of counsel in this proceeding before the speech of the Agent. My envoie relates to questions concerning the role of the Court in cases in which compliance by the respondent State is expected to be partial or otherwise problematic.

The matters to which I shall address myself are not directly connected with the substantive issues in this case. At the same time, in my submission, they are not directed to matters which are extra-judicial, either. They are relevant, in my submission, to matters which could be described as relevant to the judicial atmosphere in which the Court approaches the points of substance, and in that context I shall address myself to particular considerations, particular preoccupations of the Applicant State, and I shall, of course, be speaking entirely within my role as counsel of the Republic of Nicaragua.

By way of preface, I would like to refer to the general problem of non-compliance with the decisions of courts. It would be facile, although it is often assumed in academic circles to be so, it would be facile to assume that the problem of non-compliance is peculiar to international tribunals. Those who think that have usually done very little thinking about the problem of compliance with *municipal* law. And yet it is not necessary to look very far to see many examples of situations in municipal law where non-compliance is so to speak hidden or pre-empted by devices which are so familiar that we barely notice what is happening. The use of amnesty laws for example, the use of instruments which are constitutional to change decisions of courts. In Britain the War Damage Act of 1964 did not merely change the law, it literally expunged the result of a particular decision of the highest court, the House of Lords. Another example is provided by the case of *Brown* v. *Board of Education*, in the United States Supreme Court, 347 US 489 (1952), a very important decision, familiar to all, on racial discrimination. The Supreme Court of the United States actually envisaged the problems of non-compliance by requiring execution "with all deliberate speed". The court thus faced the problem that one would expect in the actual political situation. Amnesty laws are perhaps the simplest example of what I am referring to. And the problem of course is that one may be tempted, a court may be tempted so to speak, to move towards compliance or part compliance by a certain element of conciliation or moderation, which involves trying to ensure a sort of compatibility which may risk almost seeming to legitimize illegality or simply adjusting the law to the facts. Now, that is the situation that may obtain in municipal law.

In this Court there are familiar problems involving the non-appearance of respondent States and I do not intend to go into that general question or into the very interesting issues raised in the literature. My concern with the problem of non-appearance, is simply that non-appearance is a symptom of the possibility, an indication of non-compliance by the Respondent State, either concurrently with the decision of the Court or perhaps later on after the decision of the Court, in the final phase of the proceedings. It is true to say that the ultimate juncture is often not reached. In the *Fisheries Jurisdiction* cases, the law, the substantive law relating to matters in the Law of the Sea, was about to change anyway. In the *Nuclear Tests* cases, the claim was held to be inadmissible and in the *Aegean Sea* case, the Court decided that it did not have jurisdiction. However in the *Hostages* case, as in the present proceedings, the Court reached the position where it held that it had jurisdiction and the claim was admissible and thus moved on to the merits. And so, you have a situation which is not for the first time but for the second time, where the Court has faced the problem of non-appearance and moved on to the merits.

In this case there are certain special circumstances. In the first place, the non-appearing State is a major power in conflict with a small developing State. Now, this is significant in my respectful submission, because the evolution of international law in the second part of this century has in its way been very remarkable. When I learnt some international law first, early in the 1950s, the great question in the United Kingdom and the west generally was, how could the so-called new States, what was later called the "third world", be persuaded to use the International Court, could be persuaded to resort to international tribunals? Well, the fact is that there is a lot of evidence that the third world is resorting to international tribunals and these proceedings are by no means the only example. And, of course, some States resort to the Court itself, some to a chamber of the Court and some to special courts of arbitration like the one concerned with the case between the two Guineas. And the fact is that the third world is a part of the Court and its process and has expectations concerning the Court. Nor should this be a matter of surprise, because the system of diplomacy is multi-cultural, should be multi-cultural and has for some long period been multi-cultural. Judge Ago has dealt with the evidence of that in an interesting article in the *British Year Book of International Law* not long ago (Vol. 53 (1982), p. 213).

Mr. President, against that background, I would move to the particular considerations that I want to place before the Court on behalf of the Applicant State. This case is not about Nicaragua alone, it is about a certain *modus operandi* of coercion, an orchestra of instruments of coercion, which may affect and does affect in the world we see about us many small States with powerful neighbours.

In the African Continent, the States of Angola and Mozambique feature in recent examples of this type of orchestra of coercion. The problem is this: in a case of this kind, the Court — any court — has a considerable discretion, a considerable power of appreciation of the evidence, the multiplicity of issues, the difficulties, and it might be that a decision was to the effect that those claims relating to the covert war were not upheld; that is one of the many choices open to the Court. My submission is that if that were the outcome of this case, although it would not be the technical finding of the Court, in the diplomatic world to politicians, to the world as it is, such a finding would *appear to be* a legitimation of a certain type of coercion, directed against weak States by powerful States. In my humble submission that would be a serious threat to the public order of the world as it now is.

If I could return for a moment to the issue of non-compliance, even in cases where there is a measure of non-compliance; for example, the *Corfu Channel* case, especially at the compensation stage; or the *United States Diplomatic and Consular Staff in Tehran* case, it is a strange fact (strange in the sense that it is not often pointed to) that in spite of the non-compliance with the Judgment in the *Corfu Channel* case, that case is regarded as an important source of principle on some important questions of international law. So with the *United States Diplomatic and Consular Staff in Tehran* case, which was a case in a crisis, it was a case with the most difficult provenance. The Court faced the issues, the Court made a series of important pronouncements on key matters of the law relating to diplomatic relations, and therefore, even in a situation where it may be expected that compliance will be either partial or there will be a complete non-compliance, what the Court does is enormously important in the actual context of international public order.

I have referred to the problem of appearing to legitimize covert war, a certain type of *modus operandi* of coercion. As a sort of supplement to that observation I would like to put the following hypothesis in front of the Court.

The hypothesis concerns a small State and a period of five or six years. In the first year of the five- or six-year period we will assume that there is evidence of arms moving across the frontier of that small State into a neighbouring State. If it appeared that the Court believed that such a set of facts justified the type of coercion brought to bear by the United States over a period of four or five years, long after the original hypothetical traffic in arms had ceased, and that it could justify the massive use of a variety of forms of coercion over that period of four or five years; in my submission that would be virtually a return to the concept visible in the 1930s in Europe, the diplomacy of provocation, where some original event is taken as a justification for a long sequence of coercion.

I am coming to my final remark, which is simply this: against the background of what I have already said I think it would be particularly unfortunate if findings were to be based upon evidence not placed before the Court by the Parties.

QUESTION PUT BY JUDGE RUDA

Judge RUDA: Nicaragua has referred, in her Memorial and in the course of these pleadings, to alleged United States violation of provisions of the United Nations Charter, the Charter of the Organization of American States, the Treaty of Friendship, Commerce and Navigation of 1956, and customary rules of international law.

However, in your Application you have referred not only to the United Nations Charter and the Charter of the Organization of American States, but also to Article 8 of the Convention of Rights and Duties of States, signed in Montevideo in 1933, and Article 1 (3) of the Convention concerning the Duties and Rights of States in the Event of Civil Strife, signed in Havana in 1928. Could you comment as to why you have not referred to these two instruments in the subsequent periods on the merits after the Application? I do not want a reply now, you can reply after these oral pleadings, in writing, at a suitable time.

STATEMENT BY MR. ARGÜELLO GÓMEZ

AGENT FOR THE GOVERNMENT OF NICARAGUA

Mr. ARGÜELLO GÓMEZ: Mr. President, Members of the Court. This is my last intervention in this most important phase of this case. During the past year and a half it has been my privilege and honour to defend the cause of my country before this highest and most respected tribunal on earth. I feel an immense responsibility. The cause of my country is also the cause of all the small nations on earth, who see in the rule of law their only means of survival. The cause of my country is, and has been, the cause of Latin America.

Many of the legal principles here at stake have been created and espoused by a distinguished line of Latin-American jurists over the past 150 years. These principles have been formulated for the very purpose of mobilizing the force of international law as a defence against the innumerable interventions of the United States in Latin America. They are the antitheses of the policy of the "big stick" which has permeated, and still permeates, the attitude of the United States toward Latin America, a policy that has been applied with particular cruelty to Nicaragua during its entire existence as a nation.

Mr. President, Nicaragua has made a comprehensive presentation of its case in fact and law in the written and oral pleadings already before you. Another speech is not necessary. I wish only to review, in the fewest words possible, the matters that have been the subject of our proceedings in the past few days.

In this phase of the proceedings, Nicaragua has presented five witnesses in oral testimony. I would like to say a word about the testimony of each of them.

Nicaragua's position on the question of arms supplied to El Salvador remains the same as it was at the beginning of the case and as it always has been. We have never varied from that position. When we filed our Application it was accompanied by an affidavit from our Foreign Minister, Father Miguel d'Escoto. He swore that: "In truth, my Government is not engaged and has not been engaged in the provision of arms or supplies to either of the factions engaged in the civil war in El Salvador."

Last week we produced in Court another senior member of the Nicaraguan Government, Commander Luis Carrión, the Vice-Minister of the Interior. He testified in open court and was subject to vigorous questioning from the Bench. On this point he said, in response to a question from the Court:

> "My Goverment has never had a policy of sending arms to opposition forces in Central America. That does not mean that this did not happen, especially in the first years after the revolution, in 1979 and 1980. Weapons might have been carried through Nicaraguan territory, weapons that might have the Salvadoran insurgents as you said, as the final recipients."

One has got to agree that there might have been arms going through Nicaragua to the Salvadoran rebels at that time, but not as a matter of government policy. Nicaragua denies also that there were several training facilities provided for headquarters for the Salvadoran rebels. Nicaragua's counsel have also stated that they hold the same views as the Government on all matters relating to these proceedings and that they have never said anything to the contrary.

Nicaragua brought Mr. MacMichael before the Court because we thought he could provide information that was important to the case. He was the one person who has seen all the evidence in the possession of the United States relating to the supply of arms to the Salvadoran guerrillas during the period of time that is relevant to this case. Thirdly, in 1981 when the United States policy was formulated and thereafter, he was the one person who could testify on the basis of evidence that there had been no such traffic during that crucial period.

We knew, of course, what his opinions were as to the earlier period, and that because he was giving oral testimony he would be asked to express them. But I would point out to the Court that his actual testimony is not inconsistent with Nicaragua's position: when asked whether the evidence which is sure about arms traffic to El Salvador, in the earlier period, established that the Government of Nicaragua was involved during that period, he replied that it was not.

Nicaragua's next two witnesses testified, in painful and graphic detail, about the terrorist activities of the *contra* forces against the people of Nicaragua. Both were asked from the Bench about alleged violations of human rights by the Nicaraguan Government. Of course, both witnesses denied any knowledge of such practices. On this issue, we have put before the Court the reports of several independent organizations that monitor the observation of human rights in various countries of the world. Let me draw the Court's attention to one of these, entitled: *Human Rights in Nicaragua: Reagan, Rhetoric and Reality* prepared by Americas Watch, which specializes in human rights conditions in the western hemisphere — it is contained in Supplemental Annex E, and it says:

> "In Nicaragua there is no systematic practice of forced disappearances, extra-judicial killings or torture. Nor has the Government practised elimination of culture or ethnic groups as the administration frequently claims. For the past two years the most violent abuses of human rights in Nicaragua have been committed by the *contras*. Here, too, the administration has substituted rhetoric for a clear look at the facts. After several outside investigations into *contra* practices, we find that *contra* combattants systematically murdered the unarmed including medical personnel, rarely take prisoners and force civilians into collaboration."

In its final conclusions the Americas Watch report also makes these points:

> "1. Far from being the moral centre of United States policy towards Nicaragua, human rights have been used to justify a policy of confrontation.
>
> 2. To that end human rights data have been distorted in the annual State Department's Country Reports on Nicaragua, in White House handouts on Nicaragua the speeches and public statements by senior officials and, most notably, in the President's own remarks on Nicaragua.
>
> 3. Such misuse of human rights to justify military interference in United States Latin American relations is an unprecedented debasement of the human rights cause."

And, speaking of credibility, in the light of these findings about the character of United States statements on human rights in Nicaragua, what are we to think about United States public statements on other issues in this case, for example, arms supply. Mr. William Huper the Finance Minister of Nicaragua, was our last witness. As the Court may already be aware, he was examined exclusively on matters relating to economic damage caused to Nicaragua by the hostile activities of the United States. Mr. Huper's evidence was intended to provide a certain background to the case as presented on liability; it was not intended to constitute a definitive basis for Nicaragua's claim to compensation. As to that, Nicaragua has requested that the Court reserve the general question of compensation for a separate phase of the case.

Mr. President, Nicaragua does not accept the thesis that Article 53 of the Statute means that the Court shall act as counsel for the non-appearing State. Article 53 cannot be understood to mean that a non-appearing State should have more rights than it would if it had appeared before the Court. In particular, Article 53 does not mean that a respondent, which normally would bear the burden of proof of an affirmative defence, can shift the burden to the applicant simply by refusing to appear; all Article 53 states is that there is no right to a default judgment and that the Court has to satisfy itself on the merits of the case. It certainly does not mean that the Court is to supply the pleadings that the absent party might have made and, even more, to introduce factual materials that are not in the record, that have not been subjected to the critical analysis of the adversary process. That would be to penalize the State appearing before this tribunal. It would also impose on counsel, and particularly the Agent of the appearing State, the embarrassment of having to submit to statements that might be made by the Court along the lines of a pleading and that could not — because of the respect owed to each and every member of the tribunal — be answered with the necessary liberty of expression.

The United States has refused to appear before this tribunal but it has not been silent during the past few days. While Nicaragua has been presenting its case in accordance with the Statute and Rules of the Court, the United States has been presenting its case in the press. I need not remind the Court that these statements and documents do not constitute evidence in this case, and cannot properly be considered by the Court. The chairs on the other side of the courtroom provide the true measure of the United States case — it is as empty as they are.

Mr. President, Members of the Court, on behalf of Nicaragua I make the following submissions. The Republic of Nicaragua respectfully requests the Court to grant the following relief:

First: the Court is requested to adjudge and declare that the United States has violated the obligations of international law indicated in the Memorial, and that in particular respects the United States is in continuing violation of those obligations.

Second: the Court is requested to state in clear terms the obligation which the United States bears to bring to an end the aforesaid breaches of international law.

Third: the Court is requested to adjudge and declare that, in consequence of the violations of international law indicated in the Memorial, compensation is due to Nicaragua, both on its own behalf and in respect of wrongs inflicted upon its nationals; and the Court is requested further to receive evidence and to determine, in a subsequent phase of the present proceedings, the quantum of damages to be assessed as the compensation due to the Republic of Nicaragua.

Fourth: without prejudice to the foregoing request, the Court is requested to award to the Republic of Nicaragua the sum of 370,200,000 United States dollars, which sum constitutes the minimum valuation of the direct damages, with the exception of damages for killing nationals of Nicaragua, resulting from the violations of international law indicated in the substance of its Memorial.

With reference to the fourth request, the Republic of Nicaragua reserves the right to present evidence and argument, with the purpose of elaborating the minimum (and in that sense provisional) valuation of direct damages and, further, with the purpose of claiming compensation for the killing of nationals of Nicaragua and consequential loss in accordance with the principles of international law in respect of the violations of international law generally, in a subsequent phase of the present proceedings in case the Court accedes to the third request of the Republic of Nicaragua.

Mr. President, Members of the Court, while we talk here in The Hague, the mercenary war goes on in Nicaragua. Since these hearings began last week, more than 50 people have been killed, wounded or kidnapped in my country, as a result of that war. As the Court knows, Article 74 of the Rules of Court provides that a request for provisional measures shall take priority over all other matters before the Court. This is obviously because such requests are inherently of an urgent nature calling for immediate relief. The same reasoning should apply to cases of the nature of the one before the Court. Nicaragua requests that this case should be given all the priority it deserves. When Nicaragua asked for interim measures of protection, the Court responded in full conformity to the requirements of the rule, in issuing its Order indicating interim measures on 10 May 1984. In the 16 months since then the United States has completely flouted the Court's Order. Nicaragua's need for relief, Nicaragua's demand for justice remains as urgent now as it was then. Mr. President, Members of the Court, Nicaragua has completed the presentation of its case, it remains for you to respond to that need and that demand.

CLOSING OF THE ORAL PROCEEDINGS

The **PRESIDENT**: Before we rise I must draw attention to the normal practice of the Court whereby the Agents of the Parties remain at its disposal to provide any further evidence or explanation that may be required.

I now declare the present hearing closed.

The Court rose at 2 p.m.

TWENTY-SIXTH PUBLIC SITTING (27 VI 86, 10 a.m.)

Present: [See sitting of 12 X 85.]

READING OF THE JUDGMENT

The **PRESIDENT**: The Court meets today to deliver in open court, in accordance with Article 58 of the Statute of the Court, its Judgment on the merits in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*).

The opening paragraphs of the Judgment, dealing with the procedural history of the case, will, as is customary, not be read out.

[The President reads paragraphs 18 to 292 of the Judgment[1].]

I shall now ask the Registrar to read the operative clause of the Judgment in French.

[Le Greffier lit le dispositif en français[2].]

President Nagendra Singh and Judges Lachs, Ruda, Elias, Ago, Sette-Camara and Ni append separate opinions to the Judgment; Judges Oda, Schwebel and Sir Robert Jennings append dissenting opinions.

In accordance with practice, the Judgment has been read today from a duplicated copy of the text, a limited stock of which will be available to the public and the press. The usual printed text of the Judgment will be available in a few weeks' time.

I declare the present sitting closed.

(*Signed*) Nagendra SINGH,
President.

(*Signed*) Santiago TORRES BERNÁRDEZ,
Registrar.

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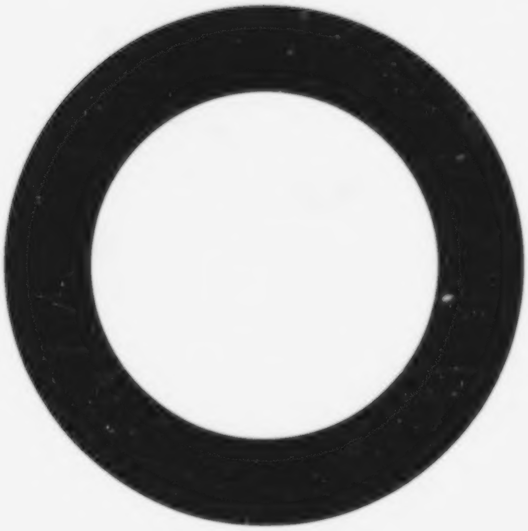
[1] *I.C.J. Reports 1986*, pp. 20-149.

[2] *C.I.J. Recueil 1986*, p. 146-149.



MEMORIAL OF NICARAGUA
(COMPENSATION)

MÉMOIRE DU NICARAGUA
(RÉPARATION)

INTRODUCTION

A. Prior Proceedings in the Case

1. On 9 April 1984, Nicaragua filed its Application in the Court charging the United States with military and paramilitary activities in and against Nicaragua in violation of United States obligations under international law. The Application asked the Court for a declaration that the United States activities were unlawful, an order to the United States to cease and desist, and compensation. In addition, Nicaragua requested that the Court indicate interim measures of protection under Article 41 of the Statute.

2. In its Order of 10 May 1984, following oral observations on the request for interim measures of protection, the Court indicated provisional measures pursuant to Article 41 of the Statute of the Court.

3. In its Judgment of 26 November 1984, following written and oral proceedings on the preliminary issues of jurisdiction and admissibility, the Court held that it had jurisdiction to entertain the Application on the basis of Article 36, paragraphs 2 and 5, of the Statute of the Court, and also by virtue of the compromissory clause in the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua of 21 January 1956. The Court also held that the Application was admissible.

4. The United States announced, on 18 January 1985, that it would not "participate" further in this case. Thereafter, Nicaragua, pursuant to Article 53 of the Statute, called upon the Court to decide the case despite the failure of the Respondent to appear and defend.

5. In its Judgment of 27 June 1986, the Court reached the following conclusions:

- that by training, arming, equipping, financing and supplying the *contra* forces, and otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, the United States has acted in breach of its obligation under customary international law not to intervene in the affairs of another state (Dispositif, subpara. 3);
- that by certain specified attacks on Nicaraguan territory in 1983-1984, and further by the acts of intervention referred to in the Dispositif, subparagraph 3, which involved the use of force, the United States has acted in breach of its obligation under customary international law not to use force against another State (Dispositif, subpara. 4);
- that by directing or authorizing overflights of Nicaraguan territory, and by the acts imputable to the United States referred to in the Dispositif, subparagraph 4, the United States has acted in breach of its obligation under customary international law not to violate the sovereignty of another State (Dispositif, subpara. 5);
- that by laying mines in the internal or territorial waters of Nicaragua, the United States has acted in breach of its obligations not to use force against another State, not to intervene in its affairs, not to violate its sovereignty, and not to interrupt peaceful maritime commerce (Dispositif, subpara. 6), and also in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation of 21 January 1956 between the United States and Nicaragua (Dispositif, subpara. 7);

that by failing to make known the existence and locations of the mines laid by it, the United States has acted in breach of its obligations under customary international law in this respect (Dispositif, subpara. 8);

that by producing in 1983 a manual entitled *Operaciones sicológicas en guerra de guerrillas*, and disseminating it to *contra* forces, the United States has encouraged the commission by them of acts contrary to general principles of humanitarian law (Dispositif, subpara. 9), and

that by the attacks on Nicaraguan territory referred to in the Dispositif, subparagraph 4, and by declaring a general embargo on trade with Nicaragua on 1 May 1985, the United States has committed acts calculated to deprive of its object and purpose the 1956 Treaty of Friendship, Commerce and Navigation between the parties (Dispositif, subpara. 10), and has acted in breach of its obligations under Article XIX of the Treaty (Dispositif, subpara. 11).

6. In its Judgment of 27 June 1986, the Court also declared that the United States was under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations. (Dispositif, subpara. 12.)

7. The Court further decided, finally, that the United States is under an obligation to make reparation to Nicaragua for all injury caused to Nicaragua by the United States breaches of customary international law and of the Treaty of Friendship, Commerce and Navigation between the Parties. The form and amount of such reparation, failing agreement between the Parties, would be settled by the Court in a subsequent phase of the proceedings. (Judgment on the Merits, para. 284; Dispositif, subpara. 15.)

8. The form and amount of Nicaragua's reparation have not been agreed upon between the Parties. In accordance with the decision of the Court, Nicaragua sent a communication to the United States on 19 July 1986 expressing its willingness to discuss the matter of reparation. The reply was negative. On 12 May 1987, Nicaragua sent a second communication to the United States reiterating its willingness to enter into negotiations in order to reach an agreement on the amount of reparation. The reply, dated 1 August 1987, again was negative. (Ann. XII.)

9. Accordingly, on 7 September 1987, Nicaragua communicated to the Court its desire that the Court initiate the compensation phase of the case. (Ann. XII.) By its Order of 18 November 1987, the Court set 29 March 1988 as the date for submission of Nicaragua's Memorial on Compensation.

10. This Memorial is submitted in accordance with the terms of the Order of 18 November 1987.

B. Overview of the Memorial

11. The Court acknowledged that in a situation of armed conflict such as the one presented in this case, "no reparation can efface the results of conduct" ruled contrary to international law. (Judgment on the Merits, para. 289, p. 144.) Nicaragua concurs. No amount of monetary reparation can truly compensate for the devastation wrought upon Nicaragua by the unlawful conduct of the United States. No such reparation can revive the human lives lost, or repair the physical and psychological injuries suffered by a population that has endured an unrelenting campaign of armed attacks and economic strangulation for over seven years. Nor can monetary reparation fully restore the Nicaraguan economy to the state it would have attained in the absence of a United States policy of military and economic aggression. The full impact of such a policy on a small, impoverished nation is simply incalculable.

12. Nicaragua has, nonetheless, quantified its losses as far as it is possible to

do so. It has assembled both the figures reflecting its human casualties and extensive economic data showing the injury sustained by its economy as a result of the unlawful conduct of the United States. The data is summarized in this Memorial, and presented in full in the Annexes attached hereto. The Annexes also contain explanations of the methodologies employed in the collection of the evidence and the calculations made to arrive at the total amounts Nicaragua claims due from the United States. The methodologies have been developed and applied by experienced economists, and the results, in large part, have been corroborated by the findings of impartial international organizations such as the Economic Commission for Latin America and the Caribbean (ECLAC), a body of the Economic and Social Council of the United Nations.

13. This Memorial is organized as follows. At the outset, the general legal principles governing reparation for unlawful acts are set forth in Chapter 1. Chapter 2 follows with a discussion of the specific legal principles relevant to the loss caused by the military and paramilitary activities, including the mode of compensation for deaths and personal injuries, and for material damage to property and the immediate production losses caused by such property damage. This chapter summarizes the evidence of the loss sustained by Nicaragua as a result of the military and paramilitary activities, and the methodology by which the evidence was collected.

14. Chapter 3 sets forth the principles of specific relevance to the loss sustained by Nicaragua from the attacks by the United States specified in paragraphs 81-85 of the Judgment on the Merits (and Dispositif, subpara. 4), and the mining of Nicaragua's harbours. The evidence of these losses and the methodology by which they were determined are then summarized.

15. In Chapter 4, Nicaragua presents its claim for defence and security costs it has incurred in order to defend itself and its citizens against the unlawful activities of the United States.

16. Chapter 5 presents an overview of the particular characteristics of the Nicaraguan economy relevant to understanding the impact of United States economic aggression on it. It then discusses the principles relevant to determining the losses caused by the United States general embargo on trade with Nicaragua. This discussion is followed by a summary of the losses Nicaragua has suffered as a result of the embargo, such as losses in net export income, increased costs of imports, and consequent production losses.

17. Chapter 6 concerns the additional loss caused to Nicaragua's development potential. The general rules applicable to determining these macroeconomic losses are set forth, followed by a discussion of the evidence of these losses and the methods by which they have been determined.

18. Nicaragua's claim for reparation also includes a claim for pecuniary satisfaction for the violations of its sovereignty that, according to the Judgment on the Merits, constituted separate and independent violations of international law. Chapter 7 discusses the relevant legal principles, and the pecuniary satisfaction to which Nicaragua maintains it is entitled for violations of its sovereignty.

19. Nicaragua also claims compensation for moral damage, in light of the scale, seriousness and persistence of the United States breaches of international law, the deliberate and intentional nature of this unlawful conduct, and the resulting hardships imposed on the Nicaraguan people. Chapter 8 sets forth the bases for this claim.

20. The temporal scope of the claims of Nicaragua is examined in Chapter 9.

21. Finally, the concluding chapter covers procedural issues relating to the non-appearance of the Respondent, the question of interest on the reparation award, and connected matters. Nicaragua's Submissions on Compensation are then presented.

CHAPTER 1

THE LEGAL PRINCIPLES GOVERNING REPARATION FOR UNLAWFUL ACTS

Introduction

22. The operation of assessing compensation for the deaths, injuries, material damage and consequential economic loss caused by the unlawful activities of the United States in and against Nicaragua involves an inquiry in several stages. In this chapter expression is given to the principles governing the general approach to the assessment of compensation. In the two chapters which follow the implications of the third and fourth subparagraphs of the Dispositif are examined. Chapter 2 will also provide an exposition of the particular modes according to which compensation for deaths, injuries and material damage are to be assessed.

A. The General Principle of State Responsibility

23. The starting point must be the principle that responsibility attaches to every internationally wrongful act of the State. The position was stated authoritatively by Judge Ago in the text of his Third Report as Special Rapporteur to the International Law Commission:

> "One of the principles most deeply rooted in the doctrine of international law and most strongly upheld by State practice and judicial decisions is the principle that any conduct of a State which international law classifies as a wrongful act entails the responsibility of that State in international law. In other words, whenever a State is guilty of an internationally wrongful act against another State, international responsibility is established 'immediately as between the two States', as was held by the Permanent Court of International Justice in the *Phosphates in Morocco* case. (*Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 28.) Moreover, as stated by the Italian-United States Conciliation Commission set up under Article 83 of the Treaty of Peace of 10 February 1947 (United Nations, *Treaty Series*, Vol. 49, p. 167), no State may 'escape the responsibility arising out of the exercise of an illicit action from the viewpoint of the general principles of international law' (*Armstrong Cork Company* case, 22 October 1953, United Nations, *Reports of International Arbitral Awards*, Vol. XIV (United Nations publication, Sales No. 65.V.4, p. 163))." (*Yearbook of the International Law Commission, 1971*, II (Part One), p. 199, at p. 205, para. 30.)

24. Indeed, the principal sources invariably state the general principle that the commission of an act either contrary to customary international law or in breach of treaty obligations gives rise to responsibility for the damage and loss of life resulting from the illegal conduct. A statement and application of the principle is to be found in the Judgment of this Court in the *Corfu Channel* case (Merits), *I.C.J. Reports 1949*, page 4 at page 23:

> "The Court therefore reaches the conclusion that Albania is responsible under international law for the explosions which occurred on October 22nd,

> 1946, in Albanian waters, and for the damage and loss of human life which resulted from them, and that there is a duty upon Albania to pay compensation to the United Kingdom."

The principle was affirmed also in the Dispositif of the Judgment (at p. 36).

25. This same principle has been given explicit acceptance in the practice of the United States. The result of the *Panay* incident in 1937 was the following telegram from the United States Secretary of State to the Ambassador in Tokyo, for transmission to the Japanese Government:

> "342. Please communicate promptly to Hirota a note as follows:
>
> The Government and people and the United States have been deeply shocked by the facts of the bombardment and sinking of the U.S.S. *Panay* and the sinking or burning of the American steamers *Meiping*, *Meian* and *Meisian* [Meihsia] by Japanese aircraft.
>
> The essential facts are that these American vessels were in the Yangtze River by uncontested and incontestable right, that they were flying the American flag; that they were engaged in their legitimate and appropriate business, that they were, at the moment, conveying American official and private personnel away from points where danger had developed; that they had several times changed their position, moving upriver, in order to avoid danger, and that they were attacked by Japanese bombing planes. With regard to the attack, a responsible Japanese naval officer at Shanghai has informed the Commander-in-Chief of the American Asiatic Fleet that the four vessels were proceeding upriver; that a Japanese plane endeavoured to ascertain their nationality, flying at an altitude of three hundred meters, but was unable to distinguish the flags; that three Japanese bombing planes, six Japanese fighting planes, six Japanese bombing planes, in sequence, made attacks which resulted in the damaging of one of the American steamers, and the sinking of the U.S.S. *Panay* and the other two steamers.
>
> Since the beginning of the present unfortunate hostilities between Japan and China, the Japanese Government and various Japanese authorities at various points have repeatedly assured the Government and authorities of the United States that it is the intention and purpose of the Japanese Government and the Japanese armed forces to respect fully the rights and interests of other powers. On several occasions, however, acts of Japanese armed forces have violated the rights of the United States, have seriously endangered the lives of American nationals and have destroyed American property. In several instances, the Japanese Government has admitted the facts, has expressed regrets, and has given assurances that every precaution will be taken against recurrence of such incidents. In the present case, acts of Japanese armed forces have taken place in complete disregard of American rights, have taken American life, and have destroyed American property both public and private.
>
> In these circumstances, the Government of the United States requests and expects of the Japanese Government a formally recorded expression of regret, an undertaking to make complete and comprehensive indemnifications, and an assurance that definite and specific steps have been taken which will ensure that hereafter American nationals, interests and property in China will not be subjected to attack by Japanese armed forces or unlawful interference by any Japanese authorities or forces whatsoever."
> (Source: *Foreign Relations of the United States, Japan, 1931-1941*, Vol. I, U.S.G.P.O., 1943, p. 523.)

26. Similarly, in a Note addressed to the Bulgarian Government on 2 August 1955, the United States Government stated the following:

> "The United States Government protests emphatically against the brutal action of Bulgarian military personnel on July 27, 1955, in firing upon a commercial aircraft of the El Al Israel Airlines, which was lawfully engaged as an international carrier. This attack, which resulted in the destruction of the aircraft, and the death of all personnel aboard, including several United States citizens, constitutes a grave violation of accepted principles of international law. The Bulgarian Government has acknowledged responsibility for this action.
>
> The United States Government demands that the Bulgarian Government (1) take all appropriate measures to prevent a recurrence of incidents of this nature and inform the United States Government concerning these measures; (2) punish all persons responsible for this incident; and (3) provide prompt and adequate compensation to the United States Government for the families of the United States citizens killed in this attack." (Whiteman, *Digest of International Law*, Vol. 8, U.S.G.P.O., Dept. of State Publicn. 8290, p. 891.)

27. Further evidence of United States recognition of the general principle can be found in the following sources:

Whiteman, *op. cit.*, pages 888-906.
Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens*, Charlottesville, 1983, pages 221-224.

B. The Principle of Effective Reparation

28. The general principle governing the actual modalities of reparation was laid down by the Permanent Court in the *Chorzów Factory* (Merits) case in a passage which has been recognized as a classical statement:

> "The essential principle contained in the actual notion of an illegal act a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it such are the principles which should serve to determine the amount of compensation due for an act contrary to international law." (*Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47.)

29. The principle has been given prominence in the sources of modern international law: see Cheng, *General Principles of Law*, London, 1953, page 233; Oppenheim, *International Law*, Volume I, 8th edition, by Hersch Lauterpacht, page 353; Jiménez de Aréchaga in Sørensen (ed.), *Manual of Public International Law*, London, 1968, pages 567-568; O'Connell, *International Law*, 2nd edition, London, 1970, II, page 1115; Verzijl, *International Law in Historical Perspective*, Volume VI, Leiden, 1973, page 742; Jiménez de Aréchaga, 159 *Recueil des cours* (1978-I), page 286; Podesta Costa and Ruda, *Derecho Internacional Publico*, 5th edition, 1979, pages 189-190; Rousseau, *Droit international public*, V, Paris, 1983,

page 232 (para. 229); Tunkin, *International Law*, Moscow, 1986, page 234; the *I.C.J. Pleadings* in the *Aerial Incident* case (at p. 102 (Memorial of Israel) and at p. 364 (Memorial of the United Kingdom)).

30. The draft articles prepared by Mr. Riphagen, Special Rapporteur of the International Law Commission, on "the content, forms and degrees of international responsibility", include the following (Art. 6):

> "1. The injured State may require the State which has committed an internationally wrongful act to:
>
> (*a*) discontinue the act, release and return the persons and objects held through such act, and prevent continuing effects of such act; and
> (*b*) apply such remedies as are provided for in its internal law; and
> (*c*) subject to Article 7, re-establish the situation as it existed before the act; and
> (*d*) provide appropriate guarantees against repetition of the act.
>
> 2. To the extent that it is materially impossible to act in conformity with paragraph 1 (*c*), the injured State may require the State which has committed the internationally wrongful act to pay to it a sum of money corresponding to the value which re-establishment of the situation as it existed before the breach would bear." (Fifth Report, *Yearbook of the International Law Commission, 1984*, II (Part One), p. 1 at p. 3; and see also *ibid.*, 1985, II (Part One), p. 4 at pp. 8-10.)

31. It will be readily apparent that the formulation in paragraph 2 of the draft article reflects the principle stated by the Permanent Court in the *Chorzów Factory* case. In its Report on the work of the thirty-eighth session, the Commission stated that during the Drafting Committee's consideration of draft Article 6: "There had been a large measure of consensus with respect to paragraph 2 of the draft article" (*Report of the International Law Commission on the Work of Its Thirty-Eighth Session*, 5 May-11 July 1986, *G.A. Official Records*, 41st sess., Suppl. No. 10 (A/41/10), pp. 96-97 (para. 65), footnote 73).

32. Judge Sir Hersch Lauterpacht underlined the significance of the views expressed in the case concerning the *Chorzów Factory* in his work *The Development of International Law by the International Court*, London, 1958 (at pp. 315-316). In his examination of the issue of measure of damages Lauterpacht points out that in the Judgment of the *Chorzów Factory* case the Permanent Court rejected assertions "that the responsibility of States must be limited to damages arising directly out of the injurious event, to the exclusion of all indirect and consequential damages". In the opinion of Lauterpacht, the Permanent Court leaned in favour of effective reparation.

33. The general principle applicable is often stated in terms of the duty to pay "just compensation": see the *Norwegian Shipowners' Claims*, *Reports of International Arbitral Awards*, I, page 307, at page 339. Another formulation refers to the requirement that compensation be "adequate": see *Chorzów Factory, Jurisdiction, Judgment No. 8, 1927, P.C.I.J. Reports, Series A, No. 9*, page 21; Whiteman, *Digest of International Law*, Volume 8, U.S.G.P.O., Department of State Publication 8290, 1967, page 1143.

34. In the specific context of the assessment of compensation for damage to or destruction of property the element corresponding to the principle of effective reparation is the principle of replacement value. The logical connection between the principle as stated in the *Chorzów Factory* case (Merits) and the principle of replacement value is evidenced by the written pleadings of the United Kingdom in the *Corfu Channel* (Merits) case. In that case the claim for the destruction of

the destroyer H.M.S. *Saumarez* was for the cost of replacement (*I.C.J. Pleadings, Corfu Channel*, Vol. I, p. 25, para. 18), and page 101 (Ann. 14). As the text of the Memorial makes absolutely clear, this claim was based upon the passage from the Judgment in the *Chorzów Factory* (Merits) case (Memorial, p. 48, para. 95). (Cf. also the United Kingdom Memorial in the *Anglo-Iranian Oil Co.* case, *I.C.J. Pleadings*, pp. 115, 117.) Moreover, it is significant that the Court accepted the valuation of the destroyer presented by the United Kingdom: see the Judgment in the Compensation phase, *I.C.J. Reports 1949*, page 244 at pages 248-249.

35. An associated factor to be taken into account is the policy of not permitting a Respondent State to take advantage of its own wrongdoing when that wrongdoing creates conditions in which the more normal methods of valuation are difficult to apply. In the *Trail Smelter Arbitration*, the Tribunal in its Interim Award stated that:

> "In considering the second part of the question as to indemnity, the Tribunal has been mindful at all times of the principle of law which is set forth by the United States courts in dealing with cognate questions, particularly by the United States Supreme Court in *Story Parchment Company* v. *Paterson Parchment Paper Company* (1931), 282 U.S. 555 as follows:
>
> > 'Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such a case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable interference, although the result be only approximate'." (Interim Decision, 16 April 1938; *Reports of International Arbitral Awards*, III, p. 1905 at p. 1920.)

36. This statement of principle by the Tribunal has been adopted by the Government of the United States and thus it is quoted, accompanied by further citations, in Hackworth, *Digest of International Law*, Volume V, U.S.G.P.O., Washington, 1943, page 721. Moreover, the quotation in Hackworth from the Interim Award in the *Trail Smelter Arbitration* is immediately preceded by passages from the *Chorzów Factory* (Merits) Judgment, including the passage quoted earlier (para. 28) containing the judicial affirmation that "reparation must, as far as possible, wipe out all the consequences of the illegal act . . ." (Hackworth, *op. cit.*, pp. 719-720).

C. The United States Government Has Adopted the Principle of Effective Reparation

37. The passage from the Judgment in the *Chorzów Factory* (Merits) case set forth above has been adopted and approved in the two modern authoritative *Digests* of international law published with the authority of the United States Government: see Hackworth, *Digest of International Law*, Volume V, U.S.G.P.O., Washington, 1943, pages 719-720; and Whiteman, *Digest of International Law*, Volume 8, Department of State Publication 8290, Washington, 1967, pages 1137-1138, 1199. The key element in the *Chorzów Factory* Judgment is also quoted in the United States Memorial in the case concerning *United States Diplomatic and Consular Staff in Tehran* in the following passage:

"Reparation must, as far as possible, 'wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed' (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47). Though the damage suffered by individuals may serve as a convenient scale for the calculation of the reparation due to the State, the damage suffered by the State itself must also be considered. (*Ibid.*, at p. 28.)

In the case before the Court, the United States asserts its right to full compensation for the injuries suffered both by the United States as a State and by its nationals as victims of Iran's unlawful actions." (Memorial of the Government of the United States of America, January 1980, p. 78.)

38. This recent expression of the view of the United States Government in the exactly similar context of State responsibility for unlawful conduct is of particular importance for present purposes. Not only does the principle of effective reparation form part of customary international law but there is unequivocal evidence that the United States has expressly accepted the principle (cf. the Judgment in the Merits phase of the present case, *I.C.J. Reports 1986*, pp. 99-107, paras. 188-204, *passim*). Moreover, the United States Memorial in the *United States Diplomatic and Consular Staff in Tehran* case relates to a case, like the present, which involved claims not based upon the diplomatic protection of individuals but directly upon the interests of the State.

39. It is generally recognized that in the case of a deliberate intention to harm (*dol, dolus*), the seriousness of the breach of the legal obligation concerned is relevant to the way in which compensation is to be assessed and thus points to a calculation which does not lean in favour of the Respondent State: see Brownlie, *System of the Law of Nations: State Responsibility*, Part I, 1983, page 224.

D. The Governing Principles in Summary

40. In the light of the foregoing, the principles governing the general approach to assessment of compensation in the present proceedings can be expressed in summary form.

First: the mode of reparation must be effective and thus wipe out all the consequences of the illegal act.

Second: the Respondent State has expressly accepted the principle of effective reparation.

Third: where the wrong itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be unjust to deny relief and thus relieve the wrongdoer from making amends. (See the *Trail Smelter Arbitration, Interim Award*, above, para. 35.)

Fourth: in the circumstances of the present case, the standard of reasonableness is appropriate in the assessment of damage especially in view of the necessarily approximate nature of the process of valuation (see the *Corfu Channel* case, Compensation phase, *I.C.J. Reports 1949*, p. 244 at p. 249; and also the *Trail Smelter Arbitration, Interim Award*, above, para. 35).

Fifth: the serious character of the conduct of the Respondent State is relevant to the process by which compensation is assessed.

CHAPTER 2

THE UNLAWFUL CONDUCT OF THE UNITED STATES UNDER FINDINGS 3 AND 4: THE MODALITIES OF COMPENSATION

Introduction

41. In this and the following chapter the Government of Nicaragua will examine the precise implications, for the present phase of the proceedings, of the third and fourth subparagraphs of the Dispositif of the Judgment on the Merits. These paragraphs contain the following key elements of the decision on the Merits:

> "(3) By twelve votes to three,
>
> *Decides* that the United States of America, by training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State;
>
> By twelve votes to three,
>
> (4) *Decides* that the United States of America, by certain attacks on Nicaraguan territory in 1983-1984, namely attacks on Puerto Sandino on 13 September and 14 October 1983; an attack on Corinto on 10 October 1983; an attack on Potosi Naval Base on 4-5 January 1984; an attack on San Juan del Sur on 7 March 1984; attacks on patrol boats at Puerto Sandino on 28 and 30 March 1984; and an attack on San Juan del Norte on 9 April 1984; and further by those acts of intervention referred to in subparagraph (3) hereof which involve the use of force, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State."

Section A. The General Significance of Subparagraph 3 of the Dispositif

42. In the present Chapter, the Government of Nicaragua intends to set out its understanding of the legal implications of the third finding in relation to the other parts of the Dispositif and to the Judgment as a whole.

43. The most obvious inference is that the United States is responsible for the actual consequences of the operations carried out by the *contra* forces against Nicaragua. It makes no difference for present purposes that the activities of the United States take the particular form of "training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding" military and paramilitary activities against Nicaragua. The responsibility generated must be presumed to be the normal form of unqualified State responsibility: the United States "has acted", according to the Dispositif, "in breach of its obligation under customary international law not to intervene in the affairs of another State".

44. As the Judgment emphasizes (p. 65, para. 116), the United States is responsible for its own conduct vis-a-vis Nicaragua "including conduct related to the acts of the *contras*". As the Court makes plain in a long sequence of the Judgment, the question of the responsibility of the United States in respect of "violations of humanitarian law" by the *contra* forces is distinct from the overall question of the responsibility of the United States for breaches of customary international law: see the Judgment, pages 63-65, paragraphs 113-116.

45. In the same connection, the examination of "the question of degree of control" of the *contras* by the United States Government in the Judgment (pp. 53-65, paras. 93-116) is related to the precise issue of the responsibility of the United States for activities of the *contras* involving breaches of the humanitarian law of war and not otherwise. This is confirmed by the later sections of the Judgment, which elaborate upon the whole question of responsibility for violations of "the fundamental general principles of humanitarian law": see the Judgment, pages 112-115, paragraphs 216-220; pages 129-130, paragraphs 254-256; pages 138-139, paragraphs 277-278.

46. In conclusion, apart from the specific issue of the breaches of humanitarian law (an issue not actually raised in the pleadings presented by Nicaragua), the reponsibility of the United States depends upon its *relationship* with the *contra* forces whether or not this relationship involved some degree of control amounting to the high standard referred to hypothetically by the Court (pp. 65-66, para. 115) as "effective control of the military or paramilitary operations". What is significant is the finding by the Court that there was a *sufficient* relationship on the basis of the evidence available to justify the important decision that the "United States of America ... has acted ... in breach of its obligation under customary international law not to intervene in the affairs of another State". In any case, the nature of the relationship has been clarified as a consequence of the evidence produced during the "Iran-Contra" hearings. (See Ann. X.)

47. In its Memorial, Nicaragua claims compensation from the United States for damage done in the course of the military and paramilitary operations against Nicaragua. In many instances, the immediate actions that led to the deaths, injuries and material damage were executed by the *contras*. Nicaragua's claim to be compensated for the damage is based upon the fact that it was the consequence of the unlawful conduct of the United States in relation to the *contras*.

48. The responsibility of the United States for *contra* damage is not dependent upon imputation to the United States of the acts of the *contras*. It is important not to "confuse the imputation of an illicit act with the imputation of resulting responsibility" (see, for example, Judge Ago, 68 *Recueil des cours* (1939-II), p. 451).

49. Although action by an individual acting *qua* individual (and not *qua* organ of the State) cannot be imputed to the State, the State ultimately may be charged with responsibility for the individual action. Such a result is reached, for example, when a State fails to meet an international obligation to prevent the individual's action or to punish the individual once the deed has been accomplished. The illicit act is the omission of the organs of State, not the individual's action: see Judge Ago, Fourth Report, *Yearbook of the International Law Commission, 1972*, II, pages 95-126; and his separate opinion, *I.C.J. Reports 1986*, pages 189-190, paragraphs 18-19.

50. Such is the case as regards United States support for the *contras*. The immediate actions of the *contras* may be compared to harmful conduct by an individual, and the assistance of the United States to breach of an international obligation to prevent or punish. Just as States are under an obligation to prevent or punish certain conduct, the United States was, as determined unequivocally

by the Court, under an obligation not to assist the *contras* in the way it has. It is from the breach of *that* obligation that the injuries inflicted upon Nicaragua by the *contras* arose; and it is *that* breach that entails the responsibility of the United States to make reparation for those injuries. As Judge Ago points out in his separate opinion at the Merits phase of this case the Court applied the pertinent principles in the case concerning *United States Diplomatic and Consular Staff in Tehran*.

51. It must follow, in the respectful submission of the Government of Nicaragua, that the United States is responsible for *all the consequences* of its support for "the military and paramilitary activities in and against Nicaragua" provided that the following two conditions are satisfied:

(*a*) that the conduct constitutes breaches of the obligation not to intervene in the affairs of Nicaragua; and

(*b*) that the responsibility to be imputed is not in technical terms based upon violations of the fundamental principles of humanitarian law.

52. The second condition is obviously satisfied. As to the first condition, given the lack of lawful justification (see the Judgment, pp. 110-111, paras. 210-211, pp. 126-127, 246-249), it must follow that the activities of the United States in assisting the *contras ab initio* and *ipso facto* constitute acts of intervention in the internal affairs of Nicaragua for the harmful consequences of which the Respondent State is bound to make reparation.

53. This view of the matter is confirmed by the form and content of the third paragraph of the Dispositif. It is also confirmed by the substantial evidence to the effect that the persistent intention of the Government of the United States was, and continues to be, to overthrow the Government of Nicaragua. The evidence of this intention was presented in the Memorial of Nicaragua (see, in particular, Chaps. I and II). The Judgment of the Court recounts in some detail the covert objectives behind United States support for the *contras* with the overall aim of forcing major changes of internal policy upon the Government of Nicaragua: see the Judgment, pages 53-60, paragraphs 93-101. As the Court acknowledges, the policy was one of "covert operations" involving "military and paramilitary operations" in Nicaragua orchestrated and supported by the United States Central Intelligence Agency (CIA) and with specific political purposes affecting the internal affairs of Nicaragua. The *contra* forces were the chosen instrument of this policy and the consequence of the third paragraph of the Dispositif is that the measure of the United States responsibility must be based upon the damage and loss caused by the operations of the *contra* forces within Nicaragua.

54. This construction of the Dispositif is amply confirmed by the contents of the Judgment of the Court overall. In particular, the passages devoted to the application of the principle of non-intervention (pp. 123-125, paras. 239-243) relate the third finding of the Dispositif to the covert war involving the *contra* forces. The Court refers to "the coercion" of Nicaragua (para. 241) and to the giving of support to armed bands "whose purpose is to overthrow the government" of Nicaragua (*ibid.*). Moreover, the observations contained in paragraph 242 relating to the provision of "strictly humanitarian aid" and connected questions rest on the premise that the finding on violations of the principle of non-intervention concerns the activities of the *contra* forces and the consequences of those activities.

55. Paragraph 4 of the Dispositif is complementary to paragraph 3 in two significant ways. First, the decision on the principle of non-intervention is reinforced and repeated in respect of those acts of intervention "which involve

the use of force". Secondly, the picture of United States responsibility for "military and paramilitary activities in and against Nicaragua" is completed (aside from the later findings concerning overflights and the laying of mines) by the inclusion of the specific attacks against Puerto Sandino and other targets.

56. The Government of Nicaragua would respectfully draw the attention of the Court to the intimate relationship which the third and fourth paragraphs of the Dispositif bear to each other. Together with the specific operations attributable to the acts of agents of the CIA, the fourth paragraph, like its predecessor, refers broadly to the responsibility of the United States resulting directly from its assistance to the *contras* in Nicaragua. Thus this aspect of the Dispositif and the relevant passages of the Judgment underline the responsibility of the United States in respect of the damage and loss caused by the *contra* operations in Nicaragua. The position is elucidated by the following passage of the Judgment:

> "Nicaragua has also claimed that the United States has violated Article 2, paragraph 4, of the Charter, and has used force against Nicaragua in breach of its obligation under customary international law in as much as it has engaged in
>
> > 'recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua' (Application, para. 26 *(a)* and *(c)*).
>
> So far as the claim concerns breach of the Charter, it is excluded from the Court's jurisdiction by the multilateral treaty reservation. As to the claim that United States activities in relation to the *contras* constitute a breach of the customary international law principle of the non-use of force, the Court finds that, subject to the question whether the action of the United States might be justified as an exercise of the right of self-defence, the United States has committed a prima facie violation of that principle by its assistance to the *contras* in Nicaragua, by 'organizing or encouraging the organization of irregular forces or armed bands ... for incursion into the territory of another State', and 'participating in acts of civil strife ... in another State', in the terms of General Assembly resolution 2625 (XXV). According to that resolution, participation of this kind is contrary to the principle of the prohibition of the use of force when the acts of civil strife referred to 'involve a threat or use of force'. In the view of the Court, while the arming and training of the *contras* can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government. In particular, the Court considers that the mere supply of funds to the *contras*, while undoubtedly an act of intervention in the internal affairs of Nicaragua, as will be explained below, does not in itself amount to a use of force." (*I.C.J. Reports 1986*, pp. 118-119, para. 228.) (And see also *ibid.*, p. 123, para. 238.)

57. The logical force of the third and fourth paragraphs of the Dispositif in combination is the responsibility of the United States for the loss and damage caused by the activities of the *contras* both when the use of force was involved and also in respect of acts not involving the use of force but which constituted intervention in the internal affairs of Nicaragua. The comprehensive nature of this responsibility is underlined by the considerations advanced in the passage from paragraph 228 of the Judgment quoted above. This points out that the supply of funds to the *contras* did not amount to a "use of force" but was "undoubtedly an act of intervention in the internal affairs of Nicaragua". From this and from the logical structure of the Judgment as a whole, the responsibility

for the consequences of the acts of the *contra* forces must be borne by the United States by reason of the *assistance* given to the *contras* and without any requirement that individual acts of sabotage, murder and pillage should be proved to have been carried out as a result of planning or particular orders on the part of the United States. Indeed, if such proof were called for, the third subparagraph of the Dispositif would be rendered more or less otiose. And this would be a surprising outcome given the priority and prominence accorded to the third finding of the Dispositif in relation to the other findings on issues of substance.

58. In the light of the framework provided by the logical implications of certain key elements both of the Dispositif and of the Judgment as a whole, it becomes possible to develop the *modus operandi* appropriate for the valuation of the elements of loss and damage resulting from the activities of the *contra* forces and other instruments of the United States in and against Nicaragua.

Section B. The Mode of Compensation for Death and Personal Injuries

59. In the submission of the Government of Nicaragua, the inevitable consequence of the findings of the Court in the third and fourth paragraphs of the Dispositif is that the United States is bound to pay appropriate compensation for the deaths, personal injuries and material damage, resulting from its violations of the pertinent obligations of customary international law.

60. The existing literature on the subject of compensation in case of death presents a version of the relevant principles the reliability and relevance of which are substantially reduced by the following important considerations:

61. *(a)* The propositions are too general and fail to recognize that the precise mode of settling problems of compensation is connected with the substantive law bearing upon the particular case and the conduct of the parties. In a work published in 1983, Brownlie observed:

> "There is an intrinsic connection between the particular rules of substantive law and the mode which is to govern problems of 'remoteness' and 'measure of damages'. This undoubted truth is neglected in the standard works which tend to purvey general propositions concerning compensation in international law." (*System of the Law of Nations: State Responsibility, Part I*, 1983, p. 224; and see also the Preface, p. vi.)

62. *(b)* The propositions in the standard works reflect the naturally conservative approach of Claims Commissions concerned with cases involving deaths and personal injuries resulting from the acts and omissions of members of the administrative apparatus, which acts and omissions were the result of a failure to show "due diligence" rather than the implementation of a deliberate State policy established at the highest executive level and involving a persistent pattern of activity.

63. *(c)* The treatment of the subject of compensation in the standard sources (many of which were published before World War II) tends to ignore some significant episodes of modern State practice and, in particular, the written pleadings in the *Aerial Incident* case in 1959.

64. The picture which emerges from the legal literature in relation to the question of compensation for unlawful killing may be summarized as follows:

(i) The primary basis of calculation is the loss of economic support suffered by dependent relatives (and loss to the decedent's estate is not recoverable).

(ii) In the case of the death of relatives, such as wives or children who did not make pecuniary contributions to their near relatives, recovery is still allowed either on the principle that the severing of ties and mental anguish calls for reparation on moral grounds or on the basis of an expectancy of future contributions or assistance: see Whiteman, *Damages in International Law*, I, Washington, 1937, pages 693-700.

(iii) In appropriate cases the amount of compensation will be enhanced by reference to the criterion of the serious character of the misconduct causing the death: see Feller, *The Mexican Claims Commissions 1923-1934*, New York, 1935, pages 295-297.

The principles summarized above are derived from the following materials: Hackworth, *Digest of International Law*, V, 1943, pages 747-755; Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens*, 1983, pages 216-224; O'Connell, *International Law*, 2nd edition, 1970, II, page 1119; Feller, *The Mexican Claims Commission 1923-1934*, pages 110-112, 295-300, 302-303, 306; Whiteman, *Digest of International Law*, Volume 8, 1967, pages 888-906; Borchard, *Diplomatic Protection of Citizens Abroad*, 1925, pages 424-425; Verzijl, *International Law in Historical Perspective*, VI, Leiden, 1973, pages 750-752; Ralston, *The Law and Procedure of International Tribunals*, Revised edition 1926, pages 259-262; Ralston, Supplement 1936, pages 126-130; Whiteman, *Damages in International Law*, 3 volumes, 1937-1943, Volume I, pages 637-796.

65. However, it must not be assumed that these principles are applicable without modification to the present circumstances. On careful examination of the sources it will be seen that the régime of compensation described in the legal literature is designed to deal with the situation in which an alien *resident or otherwise lawfully present within the respondent State's territory* is killed either by a private person or by an official, but in either case without the killing being a deliberate act of State policy authorized by the government. In such cases it is not the killing itself but the subsequent failure of the authorities of the Respondent State to take adequate steps to apprehend and punish the killer (or to provide adequate domestic remedies), which is the basis of legal responsibility. The present case is qualitatively different. The deaths and injuries to be compensated are the consequences of a deliberate policy adopted at the highest levels of Government decision-making in the United States.

66. Whilst the circumstances are not exactly similar, the pleadings in the *Aerial Incident* case of 1959 have considerable relevance to the issues presently before the Court. In that case the claimant States contended and the Bulgarian Government accepted that the air-defence units of the latter had without reasonable excuse shot down an Israeli civil aircraft which had innocently wandered into Bulgarian air space. Some of the victims were citizens of the United States and the United States, alongside Israel and the United Kingdom, submitted Applications instituting proceedings before the Court against Bulgaria: *I.C.J. Pleadings, Aerial Incident of 27 July 1955*. It may be recalled that the Court found that it did not have jurisdiction to adjudicate upon the dispute brought before it by Israel, and the proceedings brought by the United Kingdom and the United States were discontinued in 1959 and 1960 respectively.

67. Of particular relevance for present purposes are certain passages contained in the Memorial presented to the Court by the United States. These passages bring out very clearly the delictual element in claims such as the present. The most helpful parts of the United States Memorial read as follows:

> "1. The United States Government desires to remind the Court again that the case is not one of damages, suffered by negligent act or vicarious liability. This case is one which, if committed by individuals, would submit them to charges of murder and in many countries to capital punishment and certainly

> to maximum penalties. The fact that this Court may feel it has not power to issue such judgments should not, it is submitted, prevent it from noting that the Bulgarian Government is hardly in a position to quibble about dollars. However, the sum of $257,875 requested in the Application on behalf of the private American claimants, is purely compensatory.
>
> 2. On the subject of additional amends, of which the United States gave notice in its Application, paragraph 3, the United States Government respectfully submits that the Court should grant an additional judgment to the United States Government for $100,000 for the additional wrongs wantonly committed by the Bulgarian Government; that is, other than those committed against the next of kin whose monetary claims for compensatory damages have been espoused by the United States. For if we were to follow only the compensatory theory of civil damages in general, we might conceivably reach a point where no damages would be payable though treacherous murders were committed internationally by one government on the nationals of another government. Additional amends to the injured government are therefore desirable and even necessary." (*I.C.J. Pleadings, Aerial Incident*, p. 246.)

68. The delictual element in the *Aerial Incident* case is given appropriate emphasis in the United States Memorial and in fact the pleading concludes with a special claim of $100,000 "on account of the elements of fraud, deceit, and wilful and premeditated killing of American nationals" (*ibid.*, p. 248). However, for present purposes the point of relevance is the emphasis upon the element of delict with which the entire claim is imbued, rather than the additional claim as such. Thus in the case under examination the deaths, injuries and other losses, are part and parcel of the violations recognized in paragraphs 3 and 4 of the Dispositif of the Judgment on the Merits. It follows that the deaths should be regarded in close association with and as elements of those violations. It also follows that the amount of compensation due for deaths should not be calculated according to the criterion of loss of economic support suffered by dependent relatives.

69. It is an incontrovertible fact that in the circumstances of the Nicaraguan economy and the conditions of the rural areas during the period of terrorist attacks by the *contra* forces, the concept of economic loss caused by the individual killings is impossible to apply. Thus the procedure for estimating an equitable measure of compensation should reflect the social and economic realities of Nicaragua during the material period. As the content of the United States claim in the *Aerial Incident* case indicates, the delictual element present in the legal foundations of the claim provides strong justification for a monetary compensation which reflects the essential nature of the wrongdoing.

70. The considerations advanced above apply *mutatis mutandis* to the fixing of compensation with respect to personal injuries. The principles set forth in the standard words place emphasis on proof of loss of economic support on the part of dependents, as in the case of death: see Whiteman, *Damages in International Law*, I, 1937, pages 517-634; Verzijl, *International Law in Historical Perspective*, VI, 1973, pages 751-752; Hackworth, *Digest of International Law*, V, 1943, pages 741-743; Feller, *The Mexican Claims Commissions, 1923-1934*, 1935, pages 295-300, 302-303; Whiteman, *Digest of International Law*, VIII (Sept. 1967), pages 885-888. However, this version of the applicable legal principles is subject to the principle emphasized in the United States Memorial in the *Aerial Incident* case that the compensation should reflect the delictual character of the acts which caused the death or injuries.

71. In the light of the considerations set forth earlier, the method most appropriate for the purpose of arriving at a just and practical assessment of compensation for deaths and personal injuries caused is the adoption of a lump-sum as a reflection of the human losses, which sum would at the same time be both significant and comprehensive.

Section C. The Mode of Compensation for Material Damage to Property

72. The present section of the Memorial is concerned exclusively with material losses resulting from damage to property caused by the military and paramilitary operations for which the United States is responsible. The losses to the economy of Nicaragua are the subject of separate examination (in Chaps. 5 and 6 of the Memorial).

73. As in the cases of death and personal injuries, so here, it is necessary to relate the mode of establishing compensation to the framework of substantive law within which the process of valuation is taking place. Thus the approach adopted by the United States Government in its Memorial in the *Aerial Incident* case is logically applicable. In short, the standard is related to delicts involving intention (*dol, dolus*) and, in case there is a margin of appreciation in the matter of valuation, the standard is that of damages for delict and not compensation for mere unjust enrichment.

(a) *The* modus operandi: *Replacement Value*

74. It is generally recognized that the precise form of reparation in a case of State responsibility will depend on the particular circumstances and the merits of the case: see Guggenheim, *Traité de droit international public*, II, Genève, 1954, page 67; and Oppenheim, *International Law*, Volume I, 8th edition by Hersch Lauterpacht, 1955, page 353. In the case of damage or destruction of property resulting from illegal conduct on the part of a State, the requisite standard is that of effective reparation and this is plain from the Judgment of the Permanent Court in the *Chorzów Factory* (Merits) case quoted above (paragraph 28 of Chapter 1).

75. The *modus operandi* which is the natural result of the concept of effective reparation is that of replacement value and the publicists have recognized this: see former President Jiménez de Aréchaga in Sorensen (ed.), *Manual of Public International Law*, London, 1968, pages 567-568; and Guggenheim, *Traité de droit international public*, II, Geneve, 1954, pages 68-69. The United Kingdom relied upon the principle in its Memorial in the *Corfu Channel* (Merits) case (*I.C.J. Pleadings*, I, p. 25 (para. 18) and p. 101 (Ann. 14)), and the Court accepted the valuation of the destroyer H.M.S. *Saumarez* presented by the United Kingdom: see the Judgment in the Compensation phase, *I.C.J. Reports 1949*, page 244 at pages 248-249.

76. In the circumstances of the present case, the criterion of replacement value is especially appropriate. As Professors Lillich and Christenson have observed:

> "When a market value is impossible to prove because a radical change has occurred in the economy of a country or for some other reason, alternative methods of valuation must be used." (*International Claims: Their Preparation and Presentation*, Syracuse, 1962, p. 76.)

However, in certain contexts the principle of market value can be readily applied and produces the most equitable result, as, for example, in the case of damage to export commodities.

77. In conclusion, it would, it is submitted, be natural and in accordance with principle for a tribunal assessing compensation in case of the destruction of assets caused by breaches of international law to apply, except in those cases where market value is readily ascertainable, the standard of replacement value. This was the course adopted by Max Hüber in the *Spanish Zone of Morocco* claims (1925) (*Reports of International Arbitral Awards*, II, p. 617 at p. 735); and in the *Corfu Channel* (Assessment of Compensation) case the Judgment states that "the Court considers the true measure of compensation in the present case to be the replacement cost of the *Saumarez* at the time of its loss" (*I.C.J. Reports 1949*, p. 244 at p. 249).

78. The claim relates to material damage to property. The scope of the claim has been defined in accordance with general principles of law and the ordinary standard of international law in these matters. Thus the term "property" includes all assets and enterprises, whether in public or private ownership, which would be recognized in the legal systems of the world as items of value susceptible to damage or total destruction.

79. In the case of items forming part of the productive economy, the claim includes both replacement value and the loss of profits (*lucrum cessans*) caused by the damage or destruction. The inclusion of *lucrum cessans* is a generally recognized principle of international law. The following authorities, among many others, recognize the principle: Jiménez de Aréchaga, in Sorensen (ed.), *Manual of Public International Law*, London, 1968, pages 569-570; Rousseau, *Droit international public*, V, Paris, 1983, pages 223-225, paragraph 224; O'Connell, *International Law*, 2nd edition, 1970, II, pages 1115-1116; Guggenheim, *Traité de droit international public*, II, Genève, 1954, page 71; Verzijl, *International Law in Historical Perspective*, VI, Leiden, 1973, page 756; McNair, *International Law Opinions*, II, Cambridge, 1956, page 290; Jiménez de Aréchaga, 159 *Recueil des cours* (1978-I), page 286. In the case of loss of production causing damage to the economy of a State the concept of *lucrum cessans* is applicable *mutatis mutandis*.

80. The concept of *lucrum cessans* is a helpful tool but it should not be regarded as more than that. Loss of profits and loss of production are simply types of recoverable loss and fall within the broad concept of compensable damage: see Guggenheim, *op. cit.*, page 71. It follows that there may be other forms of consequential economic loss, including items which would not come within the definition of loss of profits: see, for example, the United Kingdom Memorial in the *Anglo-Iranian Oil Co.* case, *I.C.J. Pleadings*, pages 117-118 (paras. 41-42). The overall criterion is always that of effective reparation and the principle that compensation constitutes a substantial alternative to restitution: see the United Kingdom Memorial, *ibid.*, page 117. Consequently what is involved is the "payment of a sum corresponding to the value which a restitution in kind would bear": Judgment in the *Chorzów Factory* (Merits) case, *P.C.I.J., Series A, No. 17*, page 47.

(b) *Other Forms of Economic Loss*

81. The present section of the Memorial is concerned exclusively with the assessment of compensation for the destruction of and damage to capital assets and goods. Whilst this process has taken account of loss of production (*lucrum cessans*) in the simple mode, the question of consequential economic loss in the form of damage to the development potential of Nicaragua has been left aside, and this question, together with the losses caused by the trade embargo instituted by the United States, will be dealt with in Chapters 5 and 6 of the Memorial.

Section D. The Methodology Employed in the Calculation of Compensation for Injury to Persons and Property in the Relevant Period

82. Annex I.2 *b* contains tabulations showing the number of persons killed, wounded and missing as a result of United States military and paramilitary activities, physical damage to property and production losses. Annex I.3 *b* explains the methods by which the information on these subjects was routinely gathered and tabulated since 1983, including the forms and coding procedures used. This Section of the Memorial summarizes the methodological Annex and the affidavit of Dr. Paul Oquist-Kelley, National Director, National Directorate of Information, Organisation and Systems (DINFORS) of the Presidency of the Republic, under whose authority the procedures were developed and carried out.

(i) *The Period from the Beginning of United States Military and Paramilitary Activity through April 1983*

83. In the spring of 1983, President Daniel Ortega, then Coordinator of the Junta of National Reconstruction, ordered the General Directorate of State Information and Management (DIGE) in the General Secretariat of the Junta, to make a study and analysis of the human and material damages of the United States military and paramilitary activities to date. The study was to serve as a basis for his official report to the Council of State in May 1983. Dr. Paul Oquist, who was then Director of DIGE, was in charge of the study. DIGE directed each of the relevant national ministries to assemble and report the material in its files.

84. The military and paramilitary activities were in their second year and had not reached the levels later achieved. Incidents were relatively few and the situation was so novel that the relevant ministries made special studies of many of them. For example, on 14 March 1982 the *contras* attacked and destroyed two important bridges at Rio Negro in Chinandega province and Ocotal in Nueva Segovia, with significant effects on the road transport network in those areas. (Memorial of Nicaragua on Merits **IV**, p. 12.) The Ministry of Construction made a special analysis of these incidents and their effects, the results of which were later included in the report to DIGE.

85. DIGE compiled and collated the data reported by the ministries and assembled it into a single comprehensive report that was transmitted to President Ortega. The figures for the relevant periods in Annex I.2 *b* are taken from that report. If anything, they understate the actual amount of damage, since they are not based on a comprehensive and contemporaneous reporting system, but simply reflect incidents and information that a particular ministry deemed important enough to retain in its files.

(ii) *The Computerized System Installed after May 1983*[1]

86. After the first report on the extent of the human and material damage done by the United States military and paramilitary activities, the collection of information on these matters was put on a more systematic and methodical basis. The new information system was installed because, to perform routine functions, carry out economic planning and conduct effective defence against these activities, the Government of Nicaragua needed current and accurate

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[1] Occasionally referred to in this Memorial as the "DINFORS" system.

information on a timely basis about damage to persons and property. (Certificate of Dr. Paul Oquist, Ann. I.1, p. 3.) The system uses existing reporting channels in each of the responsible ministries and institutions. The participating ministries and their senior officials are listed at Annex I.3 *b*, page 5.

87. Data collection begins in the field. The local official for each ministry is responsible for completing and forwarding a standardized form covering human and material losses in his or her geographic area of responsibility each month. Because crop cycles are annual, the Ministry of Agricultural Development and Agrarian Reform reports material damage once a year. Thus, local police officers will report through Ministry of Interior channels, army unit commanders report to the Ministry of Defence and zonal or regional directors for each of the economic ministries report to their respective superiors. The forms for these reports and the instructions for completing them are reproduced in Annex I.3 *b*, pages 6-43. Annex I.4 contains a sample of the original completed forms as filled out in the field by the reporting officials.

88. The field reports are sent to the regional office of the appropriate ministry. The regional office checks to ensure that the forms are filled out properly and fully. It then combines and collates the information into a comprehensive regional report and forwards it, together with the underlying field reports, to ministerial headquarters in Managua. There the same process is repeated for the data coming from all reporting regions. The ministries forward their reports to the Ministry of the Presidency. There, after a final review and cross-check, this information is entered into the computerized data base, where it can be used to provide a country-wide picture, regional breakdowns of the information, or data relating to specified time periods or subject-matters. DINFORS, which has overall responsibility for the coordination and operation of the system, performs a final review of the data before it goes to President Ortega.

89. The details of the procedure vary somewhat as between human and material injuries. Each local official reports all injuries to persons in his area on standardized forms, which call for the name, age, sex and occupation of the persons killed or wounded, as well as the type of injury. See Form 1, Annex I.3 *b*, page 6. Casualties are reported separately for "nuestro pueblo" — "our people" — and the *contras*. The ministries include the uncoded names of victims in their reports to the Ministry of the Presidency, which compares and verifies the information to prevent double counting. (The same injury occasionally appears on more than one local report.)

90. In the case of property damage, the valuation is made at the regional or head office of the Ministry, where personnel with the necessary expertise are located. The national office ordinarily does the calculation of production losses. The list of Informant Institutions in Annex I.3 *b*, page 5, shows that, although almost every institution has reported casualties and physical damage to property at some time in the seven war years, only the major economic ministries have reported production losses. These include the Ministries of Agricultural Development and Agrarian Reform, Natural Resources and Environment, Fisheries, Mining, Industry and Internal Commerce, as well as the private and cooperative sectors.

91. The reporting system contains detailed instructions as to the type and coding of physical damages and production loss and forms for recording the results. These are reproduced in Annex I.3 *b*, pages 6-43. The forms and instructions follow a similar pattern, with variations to meet the special needs of the particular economic sector involved. Thus, the forms for production losses in the Mining Sector provide for a separate entry for each major mining installation. The forms for the Timber and Forest Sector require separate entries for lost production due to delay or suspension of projects, workforce and forest

fires. In each case, the report calls for the number of board feet not produced, the international price and the value in United States dollars and cordobas. Similar special requirements appear in the forms for the other reporting entities.

92. Annex I.5 contains a complete record of the operation of the system with respect to fishing for the month of December 1987. In this case, the local reporting forms were filled out by the heads of fishing companies and submitted to the regional delegate of the Nicaraguan Institute for Fisheries (INPESCA) in the departments of Chinandega and Zelaya. These delegates prepare a consolidated report for each region. (Ann. I.5, pp. 4-5; the blank forms are reproduced in Ann. I.3 *b*, p. 41.) No casualties were reported for the period. Information is given separately for production losses attributable to boats that have been attacked, captured, destroyed by mines, burned or diverted for defence purposes. The form shows the potential monthly catch of the boats in each group in pounds (col. 9), the dollar price per pound (col. 10), the total dollar price of production losses in each category (col. 11) and the corresponding cordoba price (col. 12). The type of boat involved — lobsterman or shrimp boat — is shown in column 13. At INPESCA headquarters, the reports are reviewed and validated before they are submitted to the Ministry of the Presidency. Annex I.5, page 6, is the computer printout of the Ministry of the Presidency for production losses for fishing for December 1987 and contains entries for each of the items in the earlier Departmental and INPESCA reports. The dollar and cordoba value of the losses in each category are summed up on the form at Annex I.5, page 7. These sums are in turn carried forward to an overall summary of production losses in all economic sectors in the form at Annex I.5, page 8. (The fisheries entries appear at lines 4-9.)

93. The tables in Annex I.2 *b* are the product of this computerized data system. They show the numbers of killed, wounded and missing on an annual basis from 1980 until 31 December 1987, with separate figures for "nuestro pueblo" ("our people") and the *contras*. The totals for the period come to 6,760 killed, 10,546 wounded and 7,226 missing, not counting *contra* casualties. (Ann. I.2 *b*, p. 5.)

94. It is instructive to consider the distribution of these casualties by age and occupation. Although the largest number — 2,961 dead and 8,507 wounded — were in the armed forces or local militia, the majority of fatalities are civilian. Among the fatalities, 129 were teachers and 219 were doctors or other technical and professional workers, while 644 were students. A total of 7,196 victims (29.3 per cent of the total) were 20-years old or under. (*Ibid.*, p. 8.) More than 10,000 Nicaraguan children have been orphaned by the war. (Ann. I.2 *b*, p. 20.)

95. As to material damage, Annex I.2 *b* shows that property to a value of $221.6 million was physically destroyed from 1980 through 1987. Production losses for the same period came to $984.5 million, for a total of $1,206.1 million. (*Ibid.*, p. 4.) The figure for production loss is, of course, several times larger than the value given for property destroyed. The smaller figure represents only the replacement cost of capital assets. But to this value of the physical asset must be added the loss of future income from that asset, which in every case will be many times the book value. As shown above, both physical damage and production loss were routinely reported through the data collection system. The totals are generally confirmed in the 1987 ECLAC study of the Nicaraguan economy. (See excerpts in Ann. V, p. 10.)

96. An annual breakdown appears in Annex I.2 *b*, page 9, and in the ECLAC document (Ann. V, p. 10, Table 25). Agriculture and forestry accounted for 71.2 per cent of the total production losses with another 19.1 per cent in construction. (*Ibid.*, p. 9.) Physical destruction of property is analysed by economic sector and institutions. (*Ibid.*, pp. 10-15.)

97. As shown above, both physical damage and production loss were routinely reported through the data collection system. In the agricultural sector, production losses include those due to land that could not be cultivated because of military operations.

Section E. Calculation of the Quantum of Reparation the United States is Obligated to Pay as Measured by the Damages to Persons and Property Resulting from the Military and Paramilitary Activities

98. Although as shown in Chapter 9 (paras. 421-424), the date from which damages should be calculated is not later than 1 December 1981, only annual data is presented in Annex I.2 *b*. Since the damage in the last month of 1981 is relatively small, Nicaragua bases its claims in this phase of the proceedings on the figures for the period 1 January 1982 to 31 December 1987.

99. On this basis, the computation of the amount of reparation owing in respect of damage to property is straightforward. The tables in Annex I.2 *b*, page 9, summary Annex VI.1, Table 2, page 3, show that, for the years 1980 and 1981, the physical damage to property totalled $4.5 million and the production loss came to $4.4 million. Subtracting these amounts from the totals shown at the foot of the table gives the following figures for the period 1 January 1982 to 31 December 1987 (see Ann. I.2 *b*, p. 9 and the summary in Ann. VI.1, p. 3, Table 1).

Physical damage	$210,400,000[1]
Loss of production	980,100,000
Total	$1,190,500,000

100. Similarly, casualty figures for the relevant period may be calculated by subtracting the 1980 and 1981 figures from the table in Annex I.2 *b*, page 17, Table II.1. The resulting totals for "nuestro pueblo" for the period 1 January 1982 to 31 December 1987 are:

Killed	6,712
Wounded	10,521
Missing	7,222

101. There is a difficulty in assigning dollar values in each of these categories. Nicaragua has no evidence to show the length of time for which persons listed as missing were absent from their homes. In some cases, the exact circumstances of missing person reports in war zones are not clear. Similarly, although there is some information about the seriousness of the injuries to the wounded, there is not enough detail to provide a comprehensive statement of the medical costs and loss of work due to those injuries. Annex I.6 contains the available information on the severity of those permanently disabled as a result of the war among Nicaragua's military. Although incomplete, it documents, *inter alia*, 458 amputees, 395 persons who have lost the use of at least one limb and 193 who have been totally or partially blinded. It gives information for almost 2,000 concrete cases[2]. In addition to the military cases, the National Institute of Social Security and Welfare (INSSBI) has given benefits to an average of over 2,000 civilians handicapped by the war annually. On the basis of this information, it is clear

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[1] The claim in the total for physical damage in I.2 *b* is less the U.S.$6.6 million included in the system as the initial estimate for the specific attacks cited in the Dispositif. Those attacks are dealt with separately. (See Chap. 3 and Ann. 2.)

[2] A few of these cases are from the periods 1978-1979 and 1980-1981.

that more than 4,000 people have received permanent handicaps due to the war (see Ann. I/6, p. 1 and Ann. IV/5, p. 8).

102. The statistics on the number of persons killed are, in Nicaragua's submission, highly reliable. On the other hand, as is shown in Section B of this chapter [Modalities for Human Loss], paragraph 59, *supra*, the usual criteria for measuring damages for wrongful death in international disputes — such as loss of earnings or pension costs — are inapplicable in Nicaragua, a developing country with a large subsistence economy. Nicaragua has therefore suggested, paragraph 71, *supra*, that any reparation in respect of loss of life must be a conventional figure.

103. To provide some basis for judgment as to the size of such a figure, Nicaragua presents the following information about damages assessed in somewhat comparable circumstances:

104. *Benin*. On 26 January 1977, Benin complained to the United Nations Security Council concerning a commando attack carried out against Cotonou on 16 January 1977. Pursuant to Security Council resolution 405 of 14 April 1977, the Secretary-General appointed "a team of expert-consultants ... to assist the Government of Benin in evaluating the damages resulting from the act of armed aggression committed at Cotonou on 16 January 1977". After a careful study, the expert-consultants concluded that 7 persons had been killed and 51 wounded in the attack. They estimated the damages attributable to these injuries at 112 million CFA, which converts to a total of US$40 million. (See Conseil de sécurité, *Documents officiels*, S/12294/Rev.1.) The relevant United Nations documents have been deposited with the Court. (See Dossier: "Pratique du Conseil de sécurité des Nations Unies en matière d'évaluation de dommages", for this case and that of Botswana, para. 105.)

105. *Botswana*. On the morning of 14 June 1985, a group of South African special forces carried out an attack against Gabarone, Botswana, in which 12 people were killed. In a letter of the same date, Botswana requested the assistance of the Security Council in this matter. In resolution No. 568, adopted the same day, the Security Council directed the Secretary-General, *inter alia*, "to send a mission to Botswana to ... evaluate the damages caused by the premeditated and unprovoked aggressive acts committed by South Africa; ...". In its report, the special mission evaluated the damages in respect of the deaths at US$118,000 per person. Seven persons were wounded in the attack, for which the mission evaluated the total damages at $US419,800, or $US69,971 per person. (See Conseil de sécurité, *Documents officiels*, S/17453.)

106. Further, in a dispute involving the same States that are parties in the present case, Nicaragua paid indemnification for the deaths of two United States citizens. In November 1909, the government of President Zelaya executed two United States citizens for a crime alleged to have been committed in the course of an attempt, in which the United States was involved, to overthrow the Government of Nicaragua. The United States protested and severed diplomatic relations with Nicaragua in a note from Secretary of State Knox dated 1 December 1909. Thereafter, Zelaya resigned and the successor government agreed to the establishment of a mixed claims commission, which, in March 1918, awarded the sum of $20,000 for the two deaths. The present value of these awards as calculated by Nicaragua comes to $50,000 per person. The relevant documentation is in Annex XI.

107. In the last analysis, it is impossible to put a money value on human life. It is especially hard for a State to suggest a figure to compensate for the lives of its citizens. Nor is it very easy for the Court to make such a calculation.

108. Therefore, because of the difficulties both moral and economic of calculating damages for persons killed, wounded and missing on a case-by-case basis, Nicaragua has decided to request the Court to make a lump-sum award of reparation for all the injuries to persons resulting from military and paramilitary activities in the relevant period.

109. Having regard to the number of casualties, the economic consequences of their injuries and deaths to the State, the assessments that have been made in the past and the gravity of the internationally unlawful acts found to have been committed by the United States, Nicaragua believes that a substantial sum is warranted. On this branch of the claim Nicaragua submits that the United States should be required to make reparation in the amount of $900 million.

110. The total of Nicaragua's claims for damage to persons and property resulting from the unlawful conduct of the United States in "training, arming, equipping, financing and supplying the *contra* forces . . ." as found in subparagraphs (3) and (4) of the Dispositif and the related portions of the Judgment on the Merits (but apart from the losses caused by the specific attacks and mining of harbours and excluding losses caused to the development potential of Nicaragua) is as follows:

Destruction of property	$210,400,000
Production loss	980,100,000
Lump-sum reparation in respect of persons killed, wounded and missing	900,000,000
Total	$2,090,500,000

CHAPTER 3

REPARATION FOR THE SPECIFIC ATTACKS AND MINING OF HARBOURS

111. This chapter deals with injuries arising from particular acts of force by the United States against Nicaragua. It sets forth the basis of the legal obligation on the part of the United States to make reparation for these injuries, describes the methodology employed by Nicaragua in calculating the value of the damage, introduces the evidence of loss and injury that has been submitted to the Court, and states Nicaragua's claim for monetary compensation.[1]

112. In addition to arming, training, equipping, financing and supplying the *contras*, the United States itself committed acts of physical violence against Nicaragua. The Court found that on seven separate occasions, it conducted armed attacks on port installations. As the Court noted, "agents of the United States participated in the planning, direction, support and execution of the operations". (Merits, para. 86.) The operations are therefore imputable to the United States, and were so recognized by the Court. (*Ibid.*) The extensive property damage caused by these attacks is described in Annex II of this Memorial. (See Ann. II.2*b*, pp. 9-15.)

113. The mining of Nicaraguan harbours is also attributable to the United States. Those who actually placed the explosive devices in the waters in and near the ports of El Bluff, Corinto and Puerto Sandino were, as the Court found, in the pay of the United States and acting under its instruction and supervision and with its logistical support. (Merits, para. 80.) The United States contemplated and intended that the mining would have serious harmful effects. In a document disclosed during the course of the Iran-Contra Hearings conducted by the United States Congress, National Security Council Staff Member Lt. Col. Oliver L. North reported to then National Security Advisor Robert McFarlane that "Our intention [in mining the harbours] is to severely disrupt the flow of shipping essential to Nicaraguan trade during the peak export period ... [and] to further impair the already critical fuel capacity in Nicaragua". (Memorandum of North to McFarlane, Ann. X, Attachment C-1.) These destructive purposes were realized in the substantial injuries suffered by Nicaragua as a result of the mining; those injuries are described more precisely in Annex, II.3*b*.

114. In the Dispositif of its Judgment on the merits, the Court decided:

> "that the United States of America, by certain attacks on Nicaraguan territory in 1983-1984, namely [the attacks on ports *inter alia*], has acted against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State ..." (Dispositif, subpara. (4), Merits).

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[1] Nicaragua's claim in this chapter is limited to compensation for material damage caused by these unlawful specific actions of the United States. The human injuries occurring as a result of those actions, see, e.g., Merits, para. 76, are accounted for in the DINTORS study, which analysed and calculated the costs of the total United States military and paramilitary activities in and against Nicaragua, and which serves as a basis for Nicaragua's claim in Chapter 2, *supra*.

> "[and] that the United States of America, by [the attacks on ports] has committed acts calculated to deprive of its object and purpose, the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956 . . ." (Dispositif, subpara (10), Merits);

> "[and] that the United States of America, by [the attacks on ports] has acted in breach of its obligations under Article XIX of the Treaty . . ." (Dispositif, subpara. (11), Merits).

The Court also decided:

> "that, by laying mines in the internal or territorial waters of the Republic of Nicaragua during the first months of 1984, the United States of America has acted against the Republic of Nicaragua in breach of its obligations under customary international law not to use force against another State, not to intervene in its affairs, not to violate its sovereignty and not to interrupt peaceful maritime commerce . . ." (Dispositif, subpara. (6), Merits);

> "[and] that, by [mining the harbours], the United States of America has acted against the Republic of Nicaragua in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation . . ." (Dispositif, subpara. (7), Merits).

In a later portion of the Dispositif, the Court stated the normal consequence of these illegal actions under international law:

> "the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of obligations under customary international law . . ." (Dispositif, subpara. (13), Merits);

> "[and] the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of the Treaty of Friendship, Commerce and Navigation . . ." (Dispositif, subpara. (14), Merits).

115. Chapter I of this Memorial establishes that the reparation owed by a State in breach of an international obligation must be "effective"; that is, it must "wipe out all the consequences of the illegal act". (See Chap. I, para. 40, *supra*.) The primary remedy is the "re-establish[ment] of the situation as it existed before the [unlawful] act". (Art. 6, draft articles on State Responsibility, Part II, in *Yearbook of the International Law Commission*, 1984, II (Part One), p. 3; see also Chap. I, paras. 28-34, *supra*.) In cases where that remedy is not possible, however, the offender is obliged to "pay . . . a sum of money corresponding to the value which re-establishment of the situation as it existed before the breach would bear". (Art. 6, para. 2, of draft articles on State Responsibility, Art. 6, para. 2, in *Yearbook of the International Law Commission*, 1984, II (Part One), p. 3.) This approach reflects that adopted by the Permanent Court in *Factory at Chorzów*, 1928, *P.C.I.J.*, Series A, No. 17, page 47; see also Chapter I, paragraph 28, *supra*.

116. One measure of compensation for liability of this kind is the replacement value of property lost and the repair cost or diminution in value of property

damaged[1]. This measure, in the language of *Factory at Chorzów*, "correspond[s] to the value which a restitution in kind would bear" (*P.C.I.J., Series A, No. 17*, p. 47). The same measure was used by the Court in the *Corfu Channel* case. (See Chap. 1, para. 34 and Chap. 2, paras. 75-76, *supra*.)

117. The specific acts of force with which this chapter is concerned resulted in substantial damage to property and, with respect to mining the harbours, loss of income. In order to present an accurate claim for this injury, Nicaragua directed the Instituto Nicaragüense de Seguros y Reaseguros (INISER) to produce an accounting and valuation of the damage. This project involved two distinct tasks: identifying the property that had been lost or damaged, as well as special expenses incurred because of the attacks; and ascertaining the correct value of each item for reparation purposes. In the INISER study, both tasks were carried out by trained professionals who are experienced in the business of insurance adjustment. (See Affidavit of Dr. Leonel Arguello Ramirez, Ann. II.1 and Affidavit of Mr. Horacio S. Randes Sevilla, Ann. II.2.)

118. Identification of the damaged property was accomplished by means of visits to the ports themselves, supplemented by personal interviews with those knowledgeable about the incidents, and data provided by the institutions affected by the attacks. (See letters of Dr. Arguello Ramirez and Mr. Randes Sevilla, Ann. II.3 *b*, pp. 1-4.) These procedures are fully consistent with the practices of the insurance industry when the effectiveness of on-site inspections is diminished because of a lapse of time between the incident and its assessment. (See *ibid.*)

119. The actual valuation of property lost or damaged by the attacks was also performed according to standards established and adopted by the insurance industry. For lost items, INISER calculated the replacement cost in the year in which the loss occurred. Similarly, for damaged items contemporaneous repair cost has been calculated. (See *ibid.*)

120. The Report issued by INISER is submitted to the Court as Annex II.3 *b*. In Nicaragua's judgment, this Report provides a reliable and fair representation of the monetary values of the damage caused by the actions of the United States in attacking Nicaraguan ports and mining Nicaraguan harbours.

121. As compensation for the attacks on ports and mining of harbours — both violations of international law for which, according to the Judgment, Dispositif subparagraphs (13) and (14), Merits, the United States must make reparation — the Government of Nicaragua claims the following sums:

For the attacks on Puerto Sandino on 13 September and on 14 October 1983:	US$410,000.00
For the attack on Puerto Corinto on 10 October 1983:	6,054,878.24
For the attack on Puerto Potosi on 4 and 5 January 1984:	2,746,000.00
For the attack on San Juan del Sur on 7 March 1984:	Not quantified*
For attacks on boats at Puerto Sandino on 28 and 30 March 1984:	Not quantified*

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[1] Other measures include the costs incurred to immediately confront the illegal action (fire-fighting, etc.), consequential losses, violation of sovereignty, and moral damage, among others.

For the attack on San Juan del Norte on 9 April 1984:	Not quantified *
For the mining of Nicaraguan harbours in early 1984:	5,750,000.00
Total reparation for property damage due to specific attacks and mining of harbours:	US$14,960,878.24[1]

* Quantification was not possible in these cases due to the nature or amount of the damage done.

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[1] This figure represents Nicaragua's claim for damages in compensation for material injury. The significance of the specific attacks and mining of harbours as violations of Nicaragua's sovereignty is discussed in Chapter 7, *infra*. The claim is placed at present value in the final submission according to the methodology and calculations presented in Annex VI.2.

CHAPTER 4

THE SECURITY AND DEFENCE COSTS RESULTING FROM THE UNLAWFUL CONDUCT OF THE UNITED STATES

A. Introduction: The Principle

122. In the opinion of the Government of Nicaragua justice and ordinary logic require that the assessment of reparation extend to the security and defence costs resulting from the unlawful conduct of the United States. The impact of the military and paramilitary operations on the disposable resources of Nicaragua has been and continues to be substantial. It is obvious that the diversion of resources available for economic development to the purposes of defence must have adverse effects, not least for an economy of the Nicaraguan type, with an extreme shortage of foreign exchange, food, clothing and fuel, on the one hand; and no arms industry, on the other. (See Chap. 5, Sec. A.)

123. It is clear that the costs of responding to the threats to Nicaraguan security posed by the activities to which subparagraphs 3 to 9 inclusive of the Dispositif of the Judgment on the Merits relate quite naturally within the concept of effective reparation generally recognized by the sources of international law and adumbrated in Chapter 1 of the present Memorial.

124. There is evidence of a general recognition in the practice of States that the victim of an unlawful resort to force has a claim for adequate compensation for the cost of reasonable measures of self-defence: see Brownlie, *International Law and the Use of Force by States*, 1963, pages 147-148. Thus, for example, the Geneva Protocol of 1924 stipulated (in Art. 15) that the expense of repressing aggression in accordance with its provisions "shall be borne by the aggressor up to the extreme limits of its capacity". It is true that the Protocol did not enter into force, but there is no reason to doubt the *opinio juris* represented in this expression of the point of principle.

125. Following the Greco-Bulgarian frontier incident of 1925 the Commission of Inquiry appointed by the Council of the League of Nations recommended that in fixing the reparation due to Bulgaria "it would seem that account must first be taken of the cost of the military measures which the Bulgarian Government was compelled to take": see the pertinent section of the Report as reproduced in Hackworth, *Digest of International Law*, U.S.G.P.O., Washington, II, pages 1372-1376 at page 1373.

126. The recovery of the necessary costs of maintaining security against external attack and of responding to the orchestra of military and paramilitary operations for which the United States is responsible in international law is simply a particular example of the application of the principle of liability for all the actual consequences of unlawful conduct. The case is analogous to the claims relating to harm caused by pollution for which a State is responsible. Such claims naturally extend to the costs entailed in removing the source of harm. The principle concerned was applied by the Canadian Government in presenting its claim to the USSR for damage caused by the disintegration over Canada of a Soviet space object, the Cosmos 954 satellite, and the deposit on Canadian territory of hazardous radioactive debris from the satellite.

127. The Canadian claim was based both upon Article II of the Convention on International Liability for Damage caused by Space Objects and upon general principles of international law. The relevant paragraphs of the Statement of Claim annexed to the Canadian Note of 23 January 1979 read as follows:

> "18. The operations described in paragraph 8 above would not have been necessary and would not have been undertaken had it not been for the damage caused by the hazardous radioactive debris from the Cosmos 954 satellite on Canadian territory and the reasonable apprehension of further damage in view of the nature of nuclear contamination. As a result of these operations, the areas affected have been restored, to the extent possible, to the condition which would have existed if the intrusion of the satellite and the deposit of the debris had not occurred. The Departments and Agencies of the Government of Canada involved in these operations incurred, as a result, considerable expense, particularly with regard to the procurement and use of services and equipment, the transportation of personnel and equipment and the establishment and operation of the necessary infrastructure. The costs included by Canada in this claim were incurred solely as a consequence of the intrusion of the satellite into Canadian air space and the deposit on Canadian territory of hazardous radioactive debris from the satellite.
>
> 19. In respect of compensation for damage caused by space objects, the Convention provides for "... such reparation in respect of the damage as will restore ... [the claimant] to the condition which would have existed if the damage had not occurred" (Art. XII). In accordance with its Preamble, the Convention seeks to ensure "... the prompt payment ... [under its terms] of a full and equitable measure of compensation to victims of such damage" (Fourth preambular para.). Canada's claim includes only those costs which were incurred in order to restore Canada to the condition which would have existed if the damage inflicted by the Cosmos 954 satellite had not occurred. The Convention also provides that 'The compensation which the launching State shall be liable to pay for damage under this Convention shall be determined in accordance with international law and the principles of justice and equity ...' (Art. XII). In calculating the compensation claimed, Canada has applied the relevant criteria established by general principles of international law and has limited the costs included in its claim to those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty ....
>
> 21. The intrusion of the Cosmos 954 satellite into Canada's air space and the deposit on Canadian territory of hazardous radioactive debris from the satellite constitutes a violation of Canada's sovereignty. This violation is established by the mere fact of the trespass of the satellite, the harmful consequences of this intrusion, being the damage caused to Canada by the presence of hazardous radioactive debris and the interference with the sovereign right of Canada to determine the acts that will be performed on its territory. International precedents recognize that a violation of sovereignty gives rise to an obligation to pay compensation." (Brownlie, *System of the Law of Nations: State Responsibility*, Part 1, 1983, p. 97 (Note) and p. 277 (Annex).)

128. The antecedents thus justify the submission of the Government of Nicaragua that the liability of the United States to compensate Nicaragua for the necessary expenditure on external defence and the maintenance of security

in face of a constant threat of violence directed against both its armed forces and its population generally, flows from the application of the normal principles relating to the provision of effective reparation. After all, the responsibility arising from the unlawful use of force, intended, as the Court has recognized (*I.C.J. Reports 1986*, pp. 57-59, paras. 97-99; p. 133, paras. 263-265), to pursue objectives which were illegal *ab initio*, entails reparation for consequences which were intended, and is thus an *a fortiori* case when compared with the unintended consequences of the disintegration of a satellite.

B. The Period for Which Reparation Must Be Calculated

129. The elements of this question will be Chapter 9.

C. Calculation of the Quantum of Reparation

130. The expenditures on defence and security that the Government of Nicaragua has been obliged to undertake increased sharply after 1982 due to the escalation of armed attacks by personnel acting under the direction of the United States Government on ports and harbours, and the escalating actions of the *contra* forces in killing Nicaraguan nationals and destroying property [Refs. Anns. I and II; and chronology]. The following paragraphs set out a sound method for establishing the additional costs incurred.

131. The expenditure by the Government of Nicaragua on defence and security (see Ann. 7.2 for the budget figures, and the affidavit of the Minister of Finance in Ann. 7.1) between 1980 and 1982 had been relatively modest, averaging some US$157 million a year. However, the defence plans made immediately after the initial attacks in 1981 had to be adjusted upward due to escalations in the aggression in 1982 and especially in 1983 in which military and paramilitary attacks increased in both number and importance (for example, the attacks on the ports). Thus defence expenditure in 1983 represents a 53 per cent increase over that for 1982.

132. The claim of Nicaragua for defence costs necessitated by the unlawful activities of the United States is based upon the increase of expenditure in this category taking the years 1980 to 1982 as the standard of comparison. Since the aggression in fact began during this period this standard is inevitably conservative. The basis of comparison is thus the average annual expenditure in United States dollars between 1980 and 1982 (described as "Hypothesis I" in Ann. VII.2*b*, p. 2).

133. This is the methodology preferred by the Government of Nicaragua and it may be of assistance to the Court if attention is drawn to other methods of assessment which have been laid aside. A ratio of expenditure to Gross Domestic Product ("Hypothesis II", *loc. cit.*) would be valid if an international comparison between economies of different sizes were to be made; rather than, as in these proceedings, a comparison between different periods for the same country. Moreover, in fact the value of this ratio for the 1980-1982 period in Nicaragua is 7.3 per cent (Ann. 7.2, Table 1), which is actually below the 1979-1983 average of 8.5 per cent for less-developed countries estimated by S. Deegar (*Military Expenditure in Third World Countries: the Economic Effects*, Routledge & Keegan Paul, London, 1986; Table 1.3, p. 25). This is despite the fact that Nicaragua was reconstructing its armed forces after the defeat and dismantling of the National Guard in 1979.

134. Indeed the share of defence and security expenditure in the total government budget ("Hypothesis III" in Ann. VII.2, p. 1) stood at 21 per cent on average between 1980 and 1982 (Ann. VII.2, Table 4). This proportion is only slightly higher than that obtaining before the present administration came into power, when the budget share between 1976 and 1978 of the National Guard was on average 20 per cent of the total government budget (Inter-American Development Bank, *Nicaragua: Informe Economico (Ref. GN 1271)* Washington, DC, July 1983; Table 11).

135. Therefore, in order to provide a sound estimate of that part of the defence and security budget attributable to increased efforts by the Nicaraguan Government to defend itself and its citizens against the unlawful activities of the United States the most appropriate method is as follows. An average figure for the combined budgetary allocation to the Ministry of Defence and the Ministry of the Interior has been established, in United States dollars, for the years 1980-1982 (see Ann. VII.2). The budgetary results for the same category of expenditure in the years 1983 to 1987 are then compared to this baseline of "normal" expenditure, the difference being "excess" expenditure to which the claim relates.

136. The Court's attention is respectfully drawn to the fact that those budgetary figures do *not* include foreign military assistance, nor the voluntary efforts of local militias, defence of cooperative farms, etc. However, the figures do include expenditure on civilian policing, but as this did not increase significantly after 1983, it would not affect the estimates of excess expenditure.

137. On this basis the costs of defence relating to the unlawful activities of the United States emerge clearly from the following figures provided by the Nicaraguan Ministry of Finance (Ann. 7.2, Table 3) and corroborated by the UN ECLAC (Ann. 5, p. 9, note 22).

Nicaragua: Defence and Security Expenditure in the Government Budget (in US$)

	Actual	*Normal*	*Excess*
1983	277,900,000	157,200,000	120,700,000
1984	310,100,000	157,200,000	152,900,000
1985	384,300,000	157,200,000	227,100,000
1986	400,900,000	157,200,000	243,700,000
1987	464,400,000	157,200,000	307,200,000
Total			1,051,600,000

The claim for compensation in respect of excess defence expenditure is therefore: US$1,051,600,000.

CHAPTER 5

LOSS CAUSED BY THE GENERAL EMBARGO ON TRADE

137 *[bis]*. No matter how great the injury caused to Nicaragua by the internationally wrongful acts of the United States examined in previous chapters may be, this does not exhaust the loss caused. In fact, each of these categories of harm has had in turn direct repercussions upon the economy of Nicaragua as a whole which has also been harmed by the general embargo on trade with Nicaragua announced by the President of the United States on 1 May 1985.

138. This chapter is devoted to the loss caused by the trade embargo, while Chapter 6 presents the consequential loss caused to Nicaraguan development potential in general as a result of the unlawful acts dealt with in this and previous chapters of this Memorial.

139. However, the importance of these elements of loss cannot be understood without a brief overview of the general characteristics of the Nicaraguan economy, the weakening of which constitutes one of the main instruments by which the United States has intervened in Nicaraguan affairs and in effect attempted to overthrow the present government.

Section A. General Characteristics of the Nicaraguan Economy

140. The object of this section is to outline the main characteristics of the Nicaraguan economy in so far as they have a bearing upon the consequences of the illicit acts of the United States for which Nicaragua is claiming compensation before the Court. The vulnerability of the economy is established in paragraphs 141-144 and the progress towards economic reconstruction achieved before 1982 described in paragraphs 145-149. The reorganization of the economy in order to permit the survival of the population under the conditions of intense attack from 1982 onwards is outlined in paragraphs 150-155. This background is provided in order to assist the Court to appreciate the seriousness of the policy of economic destabilization adopted by the United States Government.

141. In 1979, when the Revolution took place, Nicaragua had a population of 2.5 million, with a growth rate of 3.3 per cent and infant mortality of 120 per thousand live births. Population density was 19.2 per square kilometer on the overall area of Nicaragua (130 thousand square kilometers) and 51.1 per square kilometer of arable land. The country had a per capita GDP calculated at US$720 by the World Bank (see World Bank, *Nicaragua: The Challenge of Reconstruction*, Report No. 3524-NI; Washington, DC, October 9, 1981, p. 1; other data in this paragraph come from the same source) derived from a basically agricultural economy based on largely unprocessed export commodities (coffee, sugar, bananas, meat, etc.) and other natural resource products (marine products, mining and timber), a staple food sector (maize, beans, sorghum and rice), and an incipient manufacturing sector reliant on imported raw materials and United States technology for its operations.

142. Much of the export production of Nicaragua takes place in zones that were to be subsequently affected by *contra* action. Specifically, coffee is mainly produced in the northern regions I and VI (Esteli, Matagalpa and Jinotega), while meat comes from Region V (Boaco, Chontales), and marine products,

precious metals and timber from the Atlantic Coast. Two basic foodcrops for the population — maize and beans — also came from the mountainous northeastern zones where fighting has also been intense. In other words, it is agriculture in particular, and primary production generally, that is most affected by the war (see Ann. I.2*b*). Of the major agricultural products, only sugar, cotton, sorghum and rice are mainly grown on the Pacific plains; while manufacturing is typically concentrated in the cities, particularly Managua.

143. The Nicaraguan economy is very exposed to foreign markets in the sense that imports and exports make up an extremely high proportion of its gross domestic product. In normal times, half of material output is allocated to exports and similarly, about half of total supply is imported. If the "external trade coefficient" is defined as the ratio of the mean of exports and imports to Gross Domestic Product (GDP); then the value of this coefficient was 37 per cent in 1977, 32 per cent in 1981. However, by 1983 this ratio had fallen to 20 per cent and by 1986 to 15 per cent under the pressure of falling export receipts and limited external credits (see ECLAC, *Annual Reports*, various years). Despite this forced reduction in the "trade coefficient", the critical role of imports in key areas such as energy (half of electricity output relies on imported fuel), manufacturing export, agriculture and transport make the economy highly vulnerable to foreign exchange shortages.

144. The external trade of Nicaragua is handled predominantly through two ports situated on the northwestern coast: Corinto for dry cargo and Puerto Sandino for crude oil. In 1984, for instance (see Instituto Nacional de Estadistica y Censos, *Anuario Estadistico 1984*, Managua, 1985, p. 85) some 96 per cent of Nicaragua's total export volume of 510,000 tonnes of exports went through Corinto, as did 61 per cent of the 1.475 million tonnes of imports. Much of the remainder was accounted for by the 35 per cent of liquid (i.e., oil) imports by weight coming in through Puerto Sandino. In other words, the entire economy was extremely dependent upon two ports with fragile infrastructure and little military defence.

145. The war against Somoza in 1978-1979, which had closely followed the earthquake of 1972, left the economy in ruins. As the World Bank pointed out (*op. cit.*, p. i):

> "i. The struggle which ended with the overthrow of the Somoza regime in July 1979 was extremely costly for Nicaragua. It seriously damaged the nation's productive capacity and led to huge financial losses. The massive flight of capital and later drops in exports led to a severe foreign exchange shortage. The destruction of factories and inventories and the loss of managerial personnel brought about a contraction of industrial activity. Agricultural output was also affected by the war and its aftermath, although not to the same extent as industry. There was a sharp decline in the output of cotton and basic grains and, moreover, the slaughter of immature beef cattle and the smuggling of herds out of the country seriously jeopardized beef production for the coming years. There is no doubt that the Nicaraguan economy suffered a severe setback: the income foregone during 1978-1980 surpassed US$2.0 billion."

146. The medium-term economic and social objectives for the reconstruction period which was expected to last at least five years, were set out by the new government of National Reconstruction in the 1980 Economic Programme (Ministerio de Planificacion, *Programa de Reactivacion Economica en Beneficio del Pueblo*, Managua, December 1979) and identified as four (*op. cit.*, pp. 11-15):

(*a*) reactivation of the economy "to the benefit of the people", favouring the basic needs of the poorer groups and limiting luxury consumption;

(*b*) creation of a dynamic and democratic State that could bring about the necessary social reforms;

(*c*) strengthening of national unity between the new government, the working people and private enterprise;

(*d*) initiation of the transition towards a more just and equal society.

147. In fact, considerable progress was made in attaining those goals between 1979 and 1982. According to the responsible United Nations agency (ECLAC, *Notas para el Estudio Economico de America Latina y el Caribe, 1982: Nicaragua*, Mexico City, 1983) GDP had fallen by 33 per cent between 1977 and 1979, but had grown by 20 per cent in 1980 and 8.5 per cent in 1981. The ECLAC noted (*op. cit.*, p. 1) that in the 1979-1982 period

> "the economy evolved in a relatively dynamic fashion, achieving advances in the redistribution of income and starting social programmes which benefited wide sectors of the population"

although external factors were generally negative: "as in the rest of the region the notable deterioration in the external terms of trade . . . (and) . . . climatological factors" affected exports and led to a decline in GDP of 2 per cent in 1982.

148. The social reforms carried out during the 1979-1982 period were considerable, particularly the literacy campaign (which reduced illiteracy from 53 per cent to 13 per cent), public health services, land reform, self-help housing, social welfare programmes, community organization and the extension of basic services such as electricity and drinking water to large sectors of the population (see T. W. Walker, ed., *Nicaragua: the First Five Years*, New York, Praeger, 1985).

149. Evaluations by international financial agencies such as the IBRD (*op. cit.*) and the Inter-American Development Bank (BID, *Informe Economico: Nicaragua*, Washington, DC, 1983) were generally positive. Criticisms of shortcomings in the macroeconomic policy of the Nicaraguan Government were essentially concerned with the high level of expenditure (on social services and public investment) and the multiple exchange-rate system, which generated inflationary pressures. As a result, both the International Bank for Reconstruction and Development (IBRD) and the Inter-American Development Bank (IDB) made optimistic forecasts of Nicaragua's development potential in general and the growth of exports and GDP in particular (see Ann. IV.2), with at least a doubling of export income and growth rates of between 3 and 6 per cent per annum in GDP over the rest of the 1980s.

150. After the 1981 military and paramilitary attacks on infrastructure and production facilities increased leading to considerable economic losses in 1982 (some US$32 million according to ECLAC, *Notas para el Estudio Economico de America Latina y el Caribe, 1987 — Nicaragua*, Mexico City, 1988; Table 25, p. 63). However, the losses from *contra* action intensified markedly in 1983 (US$165 million, *loc. cit.*) and between 1984 and 1987 averaged some US$236 million a year in material damage and immediate production losses from crops destroyed, fishing boats prevented from fishing, etc. Between 1983 and 1987, those losses (discussed in detail in Chap. 6 below) were equivalent to up to one-half of export income.

151. In consequence, the Nicaraguan Government was forced to shift towards a "survival economy" where priority was placed upon supporting the military mobilization effort (which was consuming an increasing share of national resources — already explained in Chap. 4 above) and the basic consumption of the population. Nicaraguan economic programmes from 1983 onwards stressed austerity and the need to reduce social expenditure and investment in order to

release resources for defence. Despite those efforts, the overall financial deficit of the public sector expanded, generating continuing inflation and food shortages (see E. V. K. Fitzgerald, "Financing a Revolution: Accumulation, Defence and Income Distribution in Nicaragua 1979-1986", in E. V. K. Fitzgerald and R. Vos, eds., *Financing Development: a Structuralist Approach to Monetary Policy in the Third World*, London, Gower, 1988).

152. The effect of export income losses from *contra* attacks was compounded by the United States trade embargo in 1985 and led to a severe reduction in GDP per capita in every year from 1984 onwards: the indicators fell by a cumulative 18 per cent between 1983 and 1987 (ECLAC, *op. cit.*, Table 1, p. 39). The war and the macroeconomic disequilibrium (see Ann. IV.2) led to deteriorating social conditions as well (see Ann. IV.5), causing infant mortality and illiteracy to rise once more after the notable successes of 1979-1982. In the words of the regional United Nations agency:

> "Numerous mutually-contributing factors explain this difficult situation. It is not easy to define their order of importance or appearance. Some of the extra-economic ones — such as the armed confrontation with its dramatic consequences in human and material losses — have been present for several years and may even be considered permanent. Their negative effects have an increasing impact on the crisis, obstructing the efforts of the authorities to face them and define the economic policies necessary to attenuate them.
>
> When analysing this crisis, one should not lose sight of the factors that limit development and are common to almost all Latin American economies (be they structural or specific to the crisis of the 1980s). In the case of Nicaragua, added to these are the trade embargo imposed by the United States three years ago and the aforementioned armed conflict.
>
> To varying degrees these factors have given rise to reorientations in the various spheres of economic policy, at times drastic. This has consequently obliged Nicaragua to rechannel material, human and financial resources (several of them being increasingly scarce), which combined with other equally adverse circumstances has had the unwanted consequence of raising prices and causing a severe disarticulation of the economic system." (ECLAC, *op. cit.*, p. 1; the complete text is given in Ann. V.1.)

153. Despite this situation of economic emergency and massive defence mobilization, the effort to use external aid effectively to help the poor and to protect human rights has been maintained. As to aid, a study commissioned by 11 aid agencies concluded that

> "compared with aid to most developing countries, Western aid to Nicaragua since the revolution has been well used in meeting development objectives. (...) ... despite wartime conditions, progress has been made in administering aid, in planning its allocation in accordance with national priorities, and in overseeing its disbursement and use". (Transnational Institute, *Aid that Counts: the Western Contribution to Development and Survival in Nicaragua*, Amsterdam, 1987, p. 11.)

154. Finally, a study commissioned by the Swedish International Development Authority concluded that a key threat to human rights in Nicaragua is in fact the undermining of the economy and destruction of social infrastructure in the "low intensity war" itself:

> "International attention has focused on the atrocities committed by the *contras*. Supporters of the Sandinistas can point out that insurgents who

> commit such atrocities — and the *contras* have been behaving in this way for over five years — are improbable standard-bearers of a new age of tolerance, democracy and pluralism. The most important effect of the *contra* war on the nation as a whole, however, is the direct economic damage caused by the *contras* and the indirect effects on the economy. This touches all Nicaraguans and all regions of the country and its effects will continue to be felt for many years after the fighting has come to an end." (Catholic Institute for International Relations, *Right to Survive: Human Rights in Nicaragua*, London, 1987, p. 47.)

155. In conclusion, the Nicaraguan economy since 1979 in general, and in the period of the trade embargo in particular, was extremely vulnerable to economic sanctions that affected its foreign trade or finance, and *a fortiori* to military or paramilitary attacks on production capacity. It was made progressively more vulnerable from 1982 onwards as the scale of *contra* attacks was stepped up; until after 1984 only a "survival economy" could be maintained.

Section B. United States Economic Aggressions

156. The vulnerability of the Nicaraguan economy to exogenous fluctuations on world markets, due to its extreme reliance on primary product exports and industrial imports; and on United States markets in particular, are matters of public record, as is clear from the sources cited above. This must be well known to the United States Government; and since 1981 the United States has taken advantage of this vulnerability to exert a wide array of economic weapons in order to achieve its objective of illicit intervention in Nicaraguan domestic affairs by economic destabilization. The National Security Council (see para. 158, below) refers explicitly to "our overall goal of applying stringent economic pressure".

157. The United States has traditionally employed economic weapons in order to further its economic policy goals. A detailed study by the Institute of International Economics (see G. C. Hufbauer and J. J. Schott, *Economic Sanctions Reconsidered: History and Current Policy*, Institute of International Economics, Washington, DC) reveals 59 cases of application of economic sanctions to other countries by the United States since 1940 (*op. cit.*, pp. xiii-xvi) as a foreign policy instrument. In the case of economic sanctions applied to Nicaragua, the goal is stated to be to "destabilize the Sandinista government" (*op. cit.*, Table 11, "Chronological Summary of Economic Sanctions for Foreign Policy Goals, 1914-1984", p. 19).

158. The explicit intent to destabilize the Nicaraguan economy is clear in the illegal mining of Nicaraguan harbours (Dispositif, subpara. 6). The National Security Council memorandum that describes the action (see Ann. X, Attachment C-1) reveals both the objective and perception of trade vulnerability:

> "Our intention is to severely disrupt the flow of shipping essential to Nicaraguan trade during the peak export period. (...) In this case, our objective is to further impair the already critical fuel capacity in Nicaragua."

The crucial argument (*loc. cit.*) in justifying the mining is made clear, where an attack on a specific tanker is clearly related to a wider goal evidently already established: "... it is our judgment that destroying the vessel and its cargo will be far more effective in accomplishing our overall goal of applying stringent economic pressure".

159. The military and paramilitary activities themselves have been clearly intended to destroy economic targets, even more than military ones. The

consequences in terms of export crops, food production, social infrastructure and energy supplies destroyed, are detailed in Chapter 6 below, and have been corroborated by the ECLAC (see Ann. V). In the light of this it is difficult to see how sustained destruction valued at averaging over US$31.2 million a year between 1983 and 1987 (ECLAC *ref.*) could be the result of uncontrolled *contra* activities and not the result of a strategy concerted with the United States. Nicaragua has given evidence to the Court (see the Memorial of the merits phase, IV, pp. 32-33; and affidavit by Vice Minister Luis Carrion, Ann. A, Exhibit A) to the effect that the United States had given instructions to the *contras* to attack economic objectives.

160. The Nicaraguan economy has in fact been the specific target of most of the actions judged illegal by the Court such as the mining of the harbours, attacks on ports, the "psychological manual" and the trade embargo itself. It has also been the target of other measures such as pressure on international credit institutions, the suspension of the sugar quota in 1983, which was found by the Court to lie outside the terms of the Nicaraguan application, are clearly related actions and necessary for judging the overall activities.

161. The military and paramilitary attacks on the Nicaraguan economy were complemented by United States pressure on international financial institutions in order to deny Nicaragua normal access to concessionary loans. A listing of the credits vetoed by the United States in the World Bank and the Inter-American Development Bank is given in Annex IV.2, Table 7, page 20. The intention of the United States administration to strangle the Nicaraguan economy by applying blanket political pressure on independent international financial institutions is clearly indicated in the letter of Secretary of State George P. Shultz to the Honorable Antonio Ortiz Mena, President, IADB (Ann. C, Ann. II-10 to the Nicaraguan Memorial of 30 April 1985). Incidentally, the main beneficiaries of the loan in question would have been Nicaraguan private sector farmers. The letter states:

> "We are also concerned about the possible misuse by Nicaragua of the proceeds from such a loan. As you are aware, money is fungible; monies received from the Bank would relieve financial pressures on the GON (ed.: Government of Nicaragua) and free up other monies that could be used to help consolidate the Marxist regime and finance Nicaragua's aggression against its neighbors, who are members in good standing of the Bank.
>
> I believe that we must also consider carefully the reaction of the United States Congress and the American public should this proposed loan to Nicaragua be approved. We are all too well aware of the increasing difficulties involved in gaining Congressional appropriations for the international financial institutions, such as the Inter-American Development Bank. There is little doubt that Executive Board approval of the proposed agricultural credit loan for Nicaragua would make our efforts even more difficult. In a broader sense, our joint long-term goal of strengthening the Inter-American Development Bank and expanding its resource base would be undercut by Board approval of this proposed loan."

162. An independent scholar, Professor Conroy of the University of Texas, Austin, mentions other hostile economic measures such as:

> "... successful attempts by the Reagan administration to block short-term credits from United States banks for the financing of harvests and shipping of Nicaraguan exports. (...) There were direct attempts by the Reagan administration and by political groups in the United States that supported

its position, to deter consumers from purchasing Nicaraguan products (...). There were extensive campaigns by the United States Department of State to discourage other nations from providing trade credits for Nicaraguan purchases and short-term financing for assisting with harvesting and shipping of Nicaraguan exports." (See M. E. Conroy, "Patterns of Changing External Trade in Revolutionary Nicaragua: Voluntary and Involuntary Trade Diversification", in J. Spalding, ed., *The Political Economy of Revolutionary Nicaragua*, 1987, pp. 175-176.)

163. The combination of those economic sanctions undoubtedly forms a concerted policy of destabilization exercised by the United States Government on the small, poor and highly vulnerable Nicaraguan economy. It is within this same context that both the military and paramilitary activities and the 1985 trade embargo must be seen; the objective of both has clearly been to undermine the Nicaraguan economy as part of an effort to overthrow the government. Before the GATT hearings on the embargo, the United States of America made its intentions clear:

> "The Panel noted that the United States had declared from the outset that it would not remove the embargo without a solution to the underlying political problem." (General Agreement on Tariffs and Trade, *United States — Trade Measures Affecting Nicaragua*, L/6053, 13 October 1986 — Ann. IX.9.)

Section C. The General Trade Embargo — the Legal Considerations

164. By an Executive order of 1 May 1985, the President of the United States imposed a general embargo on the United States trade relations with Nicaragua.

165. Under this instrument, the President of the United States declares:

> "I, Ronald Reagan, President of the United States of America, find that the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States and hereby declare a national emergency to deal with that threat.
>
> I hereby prohibit all imports into the United States of goods and services of Nicaraguan origin; all exports from the United States of goods to or destined for Nicaragua, except those destined for the organized democratic resistance, and transactions relating thereto.
>
> I hereby prohibit Nicaraguan air carriers from engaging in air transportation to or from points in the United States and transactions relating thereto.
>
> In addition, I hereby prohibit vessels of Nicaraguan registry from entering into United States ports, and transactions relating thereto . . .
>
> The prohibitions set forth in this Order shall be effective as of 12.01 a.m., Eastern Daylight Time, May 7, 1985, and shall be transmitted to the Congress and published in the *Federal Register*." (Ann. IX.1.)

166. The Office of Foreign Assets Control of the Department of the Treasury issued the Nicaraguan Trade Control Regulations implementing the prohibitions in Executive Order No. 12513 on 8 May 1985 (Ann. IX.3). On 31 October 1985, the President of the United States confirmed its decision (Ann. IX.2).

167. In its Judgment of 27 June 1986, the Court found that this embargo had in two respects breached the Treaty of Friendship, Commerce and Navigation

(hereinafter referred to as FCN) that had been concluded between Nicaragua and the United States on 21 January 1956.

168. First, the Court considered that:

> "[S]uch an abrupt act of termination of commercial intercourse as the general trade embargo will normally constitute a violation of the obligation not to defeat the object and purpose of the treaty." (*Case concerning Military and Paramilitary Activities in and against Nicaragua (Merits), I.C.J. Reports 1986*, p. 138, s. 276.)

169. Secondly, it found "[t]hat the embargo constituted a measure in contradiction with Article XIX of the 1956 FCN Treaty." (*Ibid.*, p. 140, s. 279.) Paragraph 3 of the said Article provides as follows:

> "3. Vessels of either Party shall have liberty, on equal terms with vessels of other countries, to come with their cargoes to all ports, places and waters of such other Party open to foreign commerce and navigation. . . ."

170. As a result, the Court decided by twelve votes to three:

> "[T]hat the United States of America (. . .) by declaring a general embargo on trade with Nicaragua on 1 May 1985, has committed [an act] calculated to deprive of its object and purpose the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956" (subpara. 10 of the Dispositif of the Judgment, *ibid.*, p. 148)

and

> "[T]hat the United States of America (. . .) by declaring a general embargo on trade with Nicaragua on 1 May 1985, has acted in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956." (Para. 11, *ibid.*)

171. Consequently, "the United States of America is under a duty to cease and refrain from all such acts" (para. 12, *ibid.*, p. 149), and, by fourteen votes to one, the Court decided:

> "[T]hat the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of the Treaty of Friendship, Commerce and Navigation signed at Managua on 21 January 1956." (Para. 14, *ibid.*)

172. The present and the following sections examine the loss caused to Nicaragua by the unlawful embargo imposed by the United States as of 1 May 1985 (with effect as of 7 May)[1] and evaluates the reparation due to it.

173. The general principles concerning reparation, as set out by the Nicaraguan Government in Chapter 1 of the present Memorial, are fully applicable to the loss caused by the trade embargo imposed by the United States on 1 May 1985 and found by the Court to be contrary to the FCN Treaty.

174. The fact that the breach is of conventional origin has no effect on the State's international responsibility. In his fifth report as Rapporteur to the International Law Commission on Responsibility of States (para. 28, notes (45)

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[1] The statistics presented hereinafter relate to the period beginning 1 May 1985 because they have been compiled on a monthly basis; and in any case, since notice of the embargo was given as of 1 May, it became operative at that date from the point of view of Nicaragua, even though the embargo was not formally in force until 7 May.

and 136), *Yearbook of the International Law Commission, 1976*, II (Part One) pp. 11-12). Judge Ago expressed the matter as follows:

> "[T]here would seem to be no justification for making breaches of obligations arising from conventions subject to a different kind of responsibility from that entailed in breaches of obligations arising from custom." (*Ibid.*, para. 30, p. 11.)

175. An international obligation is breached, and responsibility incurred, only for as long as the obligation is in force. The rule is found in Article 18, paragraph 1, of the draft articles of the International Law Commission on State responsibility:

> "1. An act of the State which is not in conformity with what is required of it by an international obligation constitutes a breach of that obligation only if the act was performed at the time when the obligation was in force for that State."

As was shown by the special rapporteur of the International Law Commission, the principle merely reflects the jurisprudence of international tribunals (Ago, 5th Report, quoted above, paras. 43 *et seq.*).

176. On the other hand, it is not important that the obligation infringed may have ceased to exist once the dispute is settled. Thus in the case concerning the *Northern Cameroons*, the Court said:

> "[I]t may be contended that if during the life of the Trusteeship the Trustee was responsible for some act in violation of the terms of the Trusteeship agreement which resulted in damage to another Member of the United Nations or to one of its nationals, a claim for reparation would not be liquidated by the termination of the Trust." (Judgment of 2 December 1963, *I.C.J. Reports 1963*, p. 35.)

177. On the basis of this Judgment and several arbitral awards, Judge Ago has expressed the view that:

> "All the decisions analysed therefore confirm the validity of the principle that a State shall be held to have incurred international responsibility if it has adopted conduct different from that required by an international obligation incumbent on it at the time such conduct took place." (Ago, 5th Report, *prec.*, para. 48, p. 17.)

178. This view is in conformity with the spirit of the provisions of Article 70, paragraph 1 (*b*), of the Vienna Convention on the Law of Treaties under which the extinction of a treaty "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination".

179. Thus in the present case the United States is required to make reparation for the damage suffered by Nicaragua as a result of the embargo, even though on the day on which the embargo was decided, it gave notice of its intention to denounce the FCN Treaty. Indeed, under Article XXV, paragraph 3, the Treaty could be abrogated only on one year's notice. Thus the obligations of the United States under the Treaty ended on 1 May 1986. It was in force both on the date when the embargo was first imposed and when it was confirmed on 31 October 1985 (Ann. IX.2).

180. The question of the date until which compensation is due to Nicaragua as a result of the embargo calls for separate consideration:

> "The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins.

> Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation." (ILC draft articles on State Responsibility, Art. 25, para. 1.)

181. The embargo, which was confirmed on 31 October 1985, continues to be detrimental to Nicaragua. It may thus be regarded as an "act of the State having a continuing character". Judge Ago has expressly cited the "maintenance of provisions in force incompatible with the provisions of a treaty" among the examples he has given to illustrate the concept of "continuing wrongful acts" (7th Report, *Yearbook of the International Law Commission, 1978*, II (Part One), s. 28, p. 42, see also: 5th Report, quoted above, s. 62, p. 22).

182. The very nature of the breach of international law constituted by the embargo would seem to justify the conclusion that the United States should be required to make reparation for as long as the embargo is in force. Nevertheless, since the Court has taken the view that the embargo was a violation of the FCN Treaty, but not of international customary law (Judgment of 27 June 1986, *I.C.J. Reports 1986*, s. 245, p. 126), and since the treaty ceased to be in effect on 1 May 1986, the obligations of the United States under the Treaty may be considered to have terminated on that date.

183. As indicated in Article 18, paragraph 3, of the International Law Commission draft articles,

> "3. If an act of the State which is not in conformity with what is required of it by an international obligation has a continuing character, there is a breach of that obligation only in respect of the period during which the act continues while the obligation is in force for that State."

184. Although the Panel of the GATT constituted to examine the embargo and its effects has ruled that under the General Agreement benefits accruing to Nicaragua have been nullified and impaired by the embargo (Ann. IX/6, p. 14), and although the Court has referred neither in the reasoning nor in subparagraphs 11 and 14 of the Dispositif of the Judgment of 27 June 1986 to any time-limit upon the United States breach of its international obligations or its obligation to make reparation, the Government of Nicaragua presents hereafter an assessment of the damages it has suffered only for the period when the FCN Treaty remained in force. As to the embargo, the relevant period thus runs from 1 May 1985 to 30 April 1986.

185. In any event there is strong evidence that the first year of the measure's application has had lasting effects (see *infra*, para. 224); and particularly in the subsequent year due to the effect upon the agricultural production cycle.

186. Liability is therefore entailed for all economic loss resulting from the embargo during the period 1 May 1985 to 30 April 1986, as well as for subsequent economic losses, that is, harm that, though occurring after 30 April 1986, was the result of the first year of the embargo.

Section D. Reparation Due to Nicaragua

187. As established in Chapter 1 above, the cardinal principle applicable to reparation is that it must, as far as possible, obliterate the prejudicial consequences of the wrongful act.

188. The only appropriate reparation for damages suffered as a result of the embargo would, in the view of the Nicaraguan Government, be the payment of an amount equivalent to the loss sustained. Any other form of reparation would

be unsuitable in the present case. No satisfaction could compensate for the material damage caused by the embargo to Nicaragua's economy. *Restitutio in integrum* would seem to be totally impracticable.

189. The Government of Nicaragua will establish hereafter the extent of the damages it has sustained as a result of the unlawful embargo both upon its exports (subsec. (*b*), *infra*) and its imports (subsec. (*c*), *infra*) as well as the losses of production (subsec. (*d*), *infra*). A few general introductory comments need to be made first about the existence and magnitude of the loss, and the method used to evaluate it.

(a) *General Principles Applicable to the Evaluation of Damages Caused by the Embargo on Nicaragua*

(1) *General considerations on the extent of the damage*

190. On several occasions, the General Assembly of the United Nations has condemned the trade embargo imposed by the United States (cf. A/RES/40/188 of 17 December 1985; A/RES/41/164 of 5 December 1986 and A/RES/42/176 of 11 December 1987) and denounced "the negative effects" of the embargo on Nicaragua's economic and social development. Even if no account is taken of the medium- and long-term consequences beyond April 1986 of the embargo for the Nicaraguan economy — which will be examined in Chapter 6, these "negative effects" are of extreme importance in spite of the fact that the actions taken by the Nicaraguan Government had some effect in limiting their impact.

191. As explained in Section A, paragraphs 140-155, *supra*, Nicaragua's economy is extremely dependent upon and strongly dominated by foreign trade. Indeed, as economists and lawyers have repeatedly stated:

> "La situation du boycott risque d'être d'autant plus incommode quand la part de son commerce extérieur est plus considérable, qu'il est plus dépendant économiquement des autres pays en produits de première nécessité ou en matières premières indispensables"[1] (Lucchini, "Le boycottage", in SFDI, colloque d'Orléans, *Aspects du droit international économique*, 1972, p. 94; see also Laferrière, "Le boycott et le droit 'international'", *RGDIP*, 1910, p. 312; Leben, "Les contre-mesures interétatiques et les réactions à l'illicéité dans la société internationale", *AFDI*, 1982, p. 72).

192. This is why, in reiterating the condemnation in paragraph 7 (iii) of the Ministerial Declaration of GATT of 29 November 1982 and UNCTAD resolution 152 (VI) of 2 July 1983, the General Assembly drew attention to the particular vulnerability of developing countries to "economic measures as a means of political and economic coercion" by developed countries and, in particular, their vulnerability to embargoes (A/RES/38/197, 20 December 1983; A/RES/39/210, 18 December 1984; A/RES/40/185, 17 December 1985; A/RES/41/165 of 5 December 1986; A/RES/42/173 of 11 December 1987).

193. In the case of Nicaragua, such dependence and vulnerability are particularly marked with regard to the United States which was its main trading partner up to 1985 (as to exports, see *infra*, para. 208, and as to imports, see *infra*, para. 225).

194. The 1987 ECLAC report on Nicaragua states:

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[1] A country will be more particularly inconvenienced by a boycott when its foreign trade plays an important role and when it is economically dependent on other countries for indispensable goods or raw materials.

> "The relatively high importance of the trade that Nicaragua has historically maintained with the United States suffices to explain the impact of such a measure." (ECLAC, LC/MEX/102, 16 February 1988, Ann. V.1, p. 8.)

195. Immediately after the fall of the Somoza dictatorship, the new government attempted to diversify Nicaragua's trade relations, not out of hostility towards the United States, but because it regarded this situation of extreme dependence to be an unreliable basis of long-term independent economic development. The 1980 Economic Programme ("Programme of Economic Reactivation to the Benefit of the People") set out market diversification as a key strategic goal:

> "This programme initiates the utilization of the major institutional changes in the external sector, ... the diversification of trade relations towards new markets ... the planning of imports ... and the renegotiation of external debt, putting them at the service of the satisfaction of the needs of the majority, at the same time as the transition to the New Economy is initiated." (Ministerio de Planificacion, *Plan de Reactivacion Economica en Beneficio del Pueblo*, Managua, 1980.)

196. As demonstrated by Professor Michael E. Conroy, despite the difficulties of this policy, it had begun to bear fruit at the time when the embargo was imposed (M. E. Conroy, "Patterns of Changing External Trade in Revolutionary Nicaragua: Voluntary and Involuntary Trade Diversification" in Rose J. Spalding, ed., *The Political Economy of Nicaragua*, 1987, pp. 169-194; see, in particular, pp. 180-183). If no such efforts had been made to diversify, the damage caused by the embargo to the Nicaraguan economy would have been even more serious.

197. In accordance with the principle whereby the extent of the harm determines the amount of the compensation, the Court will probably consider that the compensation due to Nicaragua is solely measured by the loss actually incurred. To the extent that Nicaraguan authorities have managed to find new outlets or new suppliers, the sums thus earned will be deducted from the compensation due. Because of this, also, the United States escapes further liability due to Nicaragua's trade diversification efforts[1].

198. It should also be borne in mind that the extreme suddenness of the measure taken by the United States rendered the reconversion efforts of the Nicaraguan authorities even more difficult.

199. As has been explained:

> "Most Third World nations produce and export relatively undifferentiated unprocessed or semi-processed raw materials for which it takes great time and effort to develop market contracts and market penetration. In the event of a decision to use political criteria to deny a nation access to markets, it is relatively simple for importing nations to find alternative sources. Competitive pressures reduce the ability of the exporting nation to find alternative markets, especially in the case of perishable products. And brief delays or simple disruptions in the marketing of critical exports can have immediate and dramatic impacts upon the standard of living of small, open economies that cling tenuously to export-led growth that swings widely with variations in annual export earnings." (M. E. Conroy, *op. cit.*, p. 172.)

200. Similarly, as regards imports, the close ties built up over the years with

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[1] The Government of Nicaragua respectfully suggests that this element be taken into consideration when assessing moral damages requested by Nicaragua.

United States suppliers makes rapid re-adjustment extremely difficult, particularly for the purchase of spare parts for old equipment. The embargo order was issued on 1 May 1985, and became effective six days later. Obviously, Nicaragua could not find alternative solutions, new trading partners and other markets in such a short time. By imposing a period of one year's notice prior to any termination, Article XXV, paragraph 3, of the FCN Treaty was precisely intended to avoid placing Nicaragua in such a situation. If it had been able to benefit from this one-year period, it would have been in a much better position to neutralize the effects of the embargo, but, without it, Nicaragua had to meet the consequences "head on".

(ii) *General rules for the evaluation of the damage sustained by Nicaragua*

201. Given the extreme diversity of methods applied by international tribunals to assess the damages sustained by States as a result of internationally unlawful acts, authors generally admit that

> "International law provides no precise methods of measurement for the award of pecuniary damages (. . .) [T]he general rule is to restore the injured thing to integrity again or to offer an equivalent therefor; but the problems which arise in this effort may be as numerous as the cases themselves". (Cl. Eagleton, *The Responsibility of States in International Law*, 1928, p. 191; see also M. M. Whiteman, *Damages in International Law*, Vol. II, 1937, pp. 1548-1549, or I. Brownlie, *System of the Law of Nations State Responsibility*, Part I, 1983, p. 227.)

202. This conclusion is particularly relevant when the damage, as in the present case, is complex and caused by the convergence of high miscellaneous elements. As explained by Professor Charles Rousseau,

> "Il est rare que le montant du dommage puisse être déterminé avec une exactitude absolue, notamment dans le cas de dommage causé à un ensemble complexe (récolte, troupeau) dont les éléments ne sont pas connus avec précision. L'évaluation ne peut être qu'approximative"[1]. (*Droit international public*, Vol. V, *Les rapports conflictuels*, 1983, p. 234.)

203. Nevertheless, as established in Chapter 1, the difficulty of determining damage can never provide grounds for rejecting an international claim:

> "[I]l n'est pas permis au juge de débouter le défendeur en alléguant des difficultés dans l'évaluation du fondement de la demande. Ce faisant, il commettrait un déni de justice"[2]. (G. Salvioli, "La responsabilité des Etats et la fixation des dommages et intérêts par les tribunaux internationaux", *Recueil des cours*, 1929, Vol. 28, p. 275.)

204. Thus, as indicated in Chapter 1 of this Memorial, even in the absence of precise rules about the method of evaluating damage, judges and the parties may and should rely on general principles for guidance, and, in particular, on the idea that "[R]eparation must, as far as possible, wipe out all the consequences

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[1] It is rare that the amount of damage may be determined absolutely exactly, particularly in the case of damage caused to a complex unit (harvest, herd) the various parts of which have not been identified with any certainty. Evaluation may only be approximate.

[2] A judge is not allowed to dismiss a claim because of alleged difficulty in evaluating the basis of that claim. In so doing, he would be perpetrating a denial of justice.

of the illegal act" (*Factory at Chorzów, 1928, P.C.I.J., Series A, No. 17*, p. 47 — see *supra*, Chap. I).

205. Nicaragua has assessed the loss caused to it by the unlawful embargo decreed by the United States on the basis of those general guidelines. In particular,

- the only loss considered is damage, the existence and magnitude of which can be proven — and which has been caused, without any doubt, by the embargo itself;
- the extent and cause of the loss having been established, it has not been necessary, for the purposes of this assessment, to have recourse to calculations of probability;
- lastly, Nicaragua has confined itself to the losses it sustained as a consequence of the first year of the embargo, that is, the period from 1 May 1985 to 30 April 1986.

206. The method used to make the relevant calculation is explained in detail for each category of loss in Annex III.2. The calculations are summarized in subsections (*b*) ii (paras. 212-224), (*c*) ii (paras. 231-236) and (*d*) (paras. 237-242), *infra*.

207. The total amount includes only damage that can be calculated precisely. Except in certain cases (for example, bananas), it does not include provision of the frequently high expenditure involved in organizing fact-finding and negotiating missions for the purpose of finding new markets, both for exports and imports, as well as founding and consolidating commercial offices and firms in Canada, Argentina, Spain, the Federal Republic of Germany, Belgium and Mexico. New markets were found for meat (Canada), sugar (Sri Lanka, Pakistan, the Federal Republic of Germany, the Netherlands and the USSR), molasses (Netherlands), bananas (Belgium) and marine products (Canada). Moreover, the calculations have been made product by product to the greatest extent possible in order to provide the Court with precise data, and therefore cover the five main export products and 23 categories of highly significant imports individually. The calculations for the other export and import products have been done in aggregate. The social repercussions have not, however, been quantified, and in particular the negative effects of the embargo on medical and health services and on employment. (See Ann. IV.5, however, for an overview of long-term developmental consequences in the social sector.)

(b) *Adverse Consequences of the Embargo for Nicaragua's Exports*

(i) *General considerations*

208. Although the share of Nicaragua's exports to the United States had decreased considerably during the 1960s and the 1970s, the proportion was still 36 per cent in 1980 and 12.3 per cent in 1984 (see ECLAC Report on Nicaragua, 1987, Table 11, p. 49). This reduction was partly due to the Nicaraguan Government's moves to diversify foreign trade in an orderly fashion (see *supra*, para. 195) and, administrative and customs harassment by the United States Government after 1981.

209. Moreover, for certain types of produce, the United States was the only outlet, or at least a predominant one. In 1984, the United States absorbed 100 per cent of Nicaraguan exports of bananas and molasses, 85 per cent of marine products, 76 per cent of tobacco and cigar exports, and 47 per cent of meat exported (see Ann. III.2, Table No. 2, p. 3); see also General Agreement of

Tariffs and Trade, *United States — Trade Measures Affecting Nicaragua*, Annex IX.6, Table 3, page 6.

209 [*bis*]. In these conditions, the losses sustained by a small country which was extremely vulnerable to pressure from outside were necessarily high, independently of the measures taken by the United States authorities before their embargo, and which had adverse effects on that country's trade, such as the 90 per cent reduction of the sugar quota from 58,600 short tons to 6,000 short tons per annum in breach of the commitments entered into by the United States. As a result of the latter decision, which came into force on 1 October 1983 (see Ann. IX.4) and which was condemned by a panel of GATT set up under Article XXIII, paragraph 2, of the General Agreement (see Ann. IX.5), Nicaragua suffered losses equivalent to US$33 million.

210. The Government of Nicaragua wishes to point out once more that such losses, although unquestionably caused by the wrongful acts of the United States are not included in the calculation of losses caused to Nicaragua by the embargo.

211. For this purpose, the following elements have been taken into consideration:

- the loss of cargo already loaded, prevented from reaching the United States before 7 May 1985, or goods ready to be exported and which could not be preserved;
- the difference between prices obtained from the new purchasers — which had been the object of a costly search — and those agreed with the original North American purchasers (the reference used is 1984 prices);
- when possible, additional costs involved in diversifying the exports to more distant markets including: costs of transport, forming new firms, trading offices, communications, market research, relocation of exports and personnel, and the training of labour to extract, manufacture and label goods to new specifications since the goods coming under the embargo were extracted, processed and packaged taking into consideration the proximity of the United States market and consumer demand in that country. Bananas, for instance, were cut at a specific level of the bunch to ensure their ripening during the short journey from the Nicaraguan ports to the West Coast of the United States. In the case of seafood, only the lobster tail was sold; tobacco and cigars were of a specific quality intended for the North American market, etc. In several cases, however, there has not been sufficient data to take account of these elements.

(ii) *Evaluation of harm to exports*

212. On the basis of the previous data, Annex III.2 explains the methodology that has been followed in order to calculate harm to Nicaragua's main exports. A brief summary of the main conclusions to be drawn from these studies follows:

213. *Sugar*. Average annual production is estimated at some 50,000 to 60,000 short tons, representing in 1980 about 4.4 per cent of the total value of Nicaragua's exports. The United States, following the 90 per cent reduction in the quota (see *supra*, para. 209), was buying only 6,000 tons, at a fixed price of US$20.31 per hundredweight (cwt). Thus during the one-year period which elapsed between 1 May 1985 and 30 April 1986 the value of sugar exports to the United States should have totalled US$2.437 million (based on firm commitments to purchase at a fixed price). Nicaragua was compelled to sell the extra 6,000 tons on European markets at an average price of US$5.69 per hundredweight.

Currency payments thus totalled US$683,000 amounting to a shortfall — directly due to the embargo itself — of US$1.754 million (see Ann. III.2, pp. 4-5).

214. *Bananas.* This product accounted for about 3 per cent of the total exports of Nicaragua in 1984. Due to the embargo, Nicaragua was forced to conduct a search for new markets, once again, mainly in Western Europe. A permanent office was set up in Belgium at great expense.

215. The damages sustained may be classified in two categories. First, there is the price differential that is due mainly to transport costs. Secondly, there is the very high cost of the investment necessary to penetrate these new markets. Because of this, the negative effects of the embargo were particularly marked during its first year during which reparation is unquestionably due to Nicaragua. For this year alone the loss amounts to US$14.1 million (see Ann. III.2, pp. 5-6 and Table No. 4, on p. 7).

216. *Seafood.* The United States represented 85 per cent of the total market prior to the embargo. Losses totalled US$320,000 because of spoiled goods and "reconversion" and storage costs, and US$3.15 million owing to the price differential. The total comes to US$3.48 million (see Ann. III.2, p. 10, and Tables Nos. 6-A and 6-B).

217. *Meat.* Sales on the American market amounted, in 1984, to 34 per cent of Nicaragua's total meat exports in 1984. Although it has been less difficult to find new markets for meat than for bananas or sugar, there was a specific loss of US$270,000, on account of meat that was ready to be exported in May 1985 but could not be sold. To this sum should be added some US$24,000 for containers ready to be shipped at Puerto Cortes (Honduras) and returned to Nicaragua paying dead freight.

218. Moreover, because of the price differential between sales at the normal level in the United States and actual sales, Nicaragua incurred a loss of US$399,540 for the period 1 May 1985 to 30 April 1986. Total damages thus sustained therefore amount to US$690,000 (see Ann. III.2, p. 8 and Table No. 5).

219. *Tobacco and cigars.* The United States was almost the sole market prior to the embargo. The search for new customers was a particularly long and difficult one, with the result that Nicaragua was virtually unable to export these products during the first year of the embargo. Even if the storage costs and production losses are excluded, the loss amounted to US$620,000 (see Ann. III.2, p. 12).

220. With regard to other products formerly exported to the United States, in particular, molasses, sesame, coffee, etc., it is difficult to calculate these precisely for lack of complete data, but the Nicaraguan Government estimates them at US$2.2 million (see Ann. III.2, Table 14, p. 27). The basis for this figure is the average rate of loss sustained in the export of the six products and services listed above, i.e., 52 per cent applied to the total value of exports to the United States in 1984 for other products and services.

221. The total of the figures for export losses thus amounts to:

— bananas = 14,212,000
— seafood = 3,470,000
— sugar = 1,754,000
— meat = 690,000
— tobacco and cigars = 617,000
— air traffic = 6,000,000
— financial costs = 404,300

222. The embargo also seriously affected the activities of Aeronica, the Nicaraguan air company. Travel to the United States represented 45 per cent of

its total net income in 1984. Losses incurred as a result of the suppression of air traffic (passengers and goods) between 1 May 1985 and 30 April 1986 totalled US$6 million (see Ann. III.2, p. 22).

223. The embargo also led to greater financial costs for Nicaragua in connection with its exports. On average ten extra days were required for the receipt of export payments. At an average interest rate of 8 per cent per annum (the average LIBOR for 1985-1986, see Ann. VI.2), the consequent loss totals US$404.3 thousand (see Ann. III.2, p. 25 and Table No. 13, p. 33).

224. The highly significant qualitative aspects of the loss incurred due to the export embargo have not been considered either. In many cases, it has not been possible to reckon the cost of missions, communications, etc., necessary to penetrate new markets. These were particularly high during the year which followed the announcement of the embargo. Nor have values been estimated for the loss of decades of favourable business, knowledge and experience with the North American market. In Chapter 8 of this Memorial Nicaragua requests the assessment of pecuniary satisfaction for moral damages, among other causes, for the violation of the FCN Treaty. These considerations are pertinent to the assessment of those losses.

(c) *The Harmful Effects of the Embargo on Nicaragua's Imports*

(i) *General considerations*

225. The share of United States products in Nicaragua's imports is even greater than in the case of exports. From 28.8 per cent in 1977, it fell slightly to 27.5 per cent in 1980 and then to 19 per cent in 1982 and 15.1 per cent in 1984 (see ECLAC Report on Nicaragua, 1987, Table 11, p. 49) as a result of Nicaragua's policy of diversifying its trade relations after 1979 (see *supra*, paras. 195-196) (see M. E. Conroy, *op. cit.*, pp. 179-183).

226. Here again, however, the gross statistics are misleading. Prior to the embargo, imports from the United States continued to play a decisive role.

> "While the overall value of imports from the United States declined, Nicaragua remained dependent on her Northern neighbor in several strategic product categories. In 1982 the United States supplied 42 per cent of imported chemicals (used largely in agriculture production) and 44 per cent of imported spare parts. Spare parts were critical in keeping the Nicaraguan economy running, particularly because much of the country's machinery in sugar production, for instance, dated back to the early decades of this century (. . .) The Ministry of Industry (for its chemical, instant coffee, cereal, beer and tanning plants) and the State-owned oil company both relied on the United States for 80 per cent of the spare parts needed in their daily operations." (S. Maxfield and R. Stahler-Sholk, "External constraints" in Walker, *op. cit.*, p. 248.)

In other words, before the embargo, the whole of Nicaragua's production was dependent on United States technology and imports, particularly because of the critical need for spare parts which often could not be found elsewhere. Table No. 8 of Annex III.2, page 14, specifies the structure of imports from the United States in 1984.

227. This situation of extreme dependence due to historical and geopolitical factors could not be remedied in the short run. Thus, the prejudicial effects of the embargo on imports were much greater than on exports.

228. The main categories of damage that can be isolated and assessed precisely are:

- the difference between the prices paid to traditional United States suppliers and those paid to new importers (when it had been possible to find them); this difference is unavoidable since it is mainly due to geographical problems: when importing goods from overseas the transport is inevitably much more important than when they come from the United States; however, the traditional structure of shipment (important sea traffic between Central America and the United States, by the "cabotage" system) can no longer be used by Nicaraguan importers (see Ann. III.2);
- the effects of the devaluation of the dollar as compared with the other main currencies in which substitute imports had to be paid;
- certain additional financial costs;
- when possible, effects directly deriving from the embargo: additional purchases made necessary by the impossibility of obtaining certain spare parts.

229. In addition, the first year of the embargo had many prejudicial affects in the medium and long term. These will be examined in subsection D (*infra*, paras. 237-241).

230. It has not been possible to calculate very precisely the "qualitative" damages caused by the embargo on imports. These exist nonetheless (see *supra*, para. 226).

(ii) *Evaluation of damages to imports*

231. Annex III.2 to the present Memorial describes the methodology that has been followed to calculate damages to Nicaraguan imports and it also applies that methodology. To avoid a piecemeal and repetitive approach, in this Memorial the following summary of the conclusions of Annex III.2 are not presented product by product as for exports, but according to the categories of injury sustained by Nicaragua.

232. To establish the amount of losses due to the higher cost of goods that Nicaragua had to import to substitute for those traditionally purchased in the United States, it has been necessary to identify categories of goods that Nicaragua formerly bought from the United States. Annex III.2 identifies 23 highly significant products on the basis of 1984 imports (see Ann. III.2, Table No. 9, p. 16). The price differential on these imports has caused a total loss of US$51.9 million.

233. These 23 products or categories of products represented, in 1984, about 40 per cent of Nicaraguan total imports from the United States. However, the dispersion of the remaining products is such that detailed studies cannot be undertaken. The Nicaraguan Government estimates that because the remaining products are of a less crucial nature and more easily obtainable elsewhere, the respective differentials in purchasing price, freight, insurance and commercial costs are of the order of half the average price increase on the 23 identified products compared to these same costs in 1984. It should be emphasized that these quantitative differentials do not reflect the significant quality differences in some products to Nicaragua's disadvantage. Therefore, losses due to higher import prices in new markets for the remaining commodities which would have been purchased in the United States are conservatively estimated at US$141.5 million.

234. In calculating losses from revaluation in new import markets, it is sufficient to determine the rate at which import trade from the United States

has been diverted to West European markets, and apply for each country the corresponding re-evaluation coefficient. The total amount comes to US$10.9 million (Ann. III.2, p. 17 and Table No. 10, p. 18).

235. Additional costs of intermediation are more difficult to establish precisely, but there has been an additional loss due to this factor.

236. The sum of losses incurred by Nicaragua and calculated above thus totals

Higher import prices	=	US$193,365,000
revaluation in new import markets	=	10,857,000

(d) *Losses of Production and Medium-Term Effect of the Embargo*

237. Obviously, the interruption of trade with the United States had immediate negative effects on production. In this respect, the immediate interruption of imports has been particularly detrimental during the first year of the embargo. Contracts worth US$12.2 million concluded with American suppliers for the purchase of agricultural produce or equipment (seeds, fertilizers, ranching supplies, spare parts) could not be honoured. Nicaraguan farmers were unable, either at that time, or, in some cases, ever again to find these indispensable items, i.e., spare parts for equipment of United States origin. This had repercussions on crops and in relation with the agricultural cycle these effects were especially important in 1986 even if the fall in production was already significant in 1985 (see Ann. III.2, pp. 24-25 and Table No. 11, pp. 29-33). The same is true of industrial production, mining and quarrying, fisheries, energy and transport (see *ibid.*, p. 21).

238. Indeed, the first year of the embargo has had negative effects in 1985-1986, and these effects have continued. It was in 1986 and not in 1985 that losses of crops due to lack of seed supplies or spare parts for the tractors during the previous year, were most marked. Also, it must be kept in mind that even if the embargo had been discontinued on 1 May 1986, it would not have been possible for Nicaragua or Nicaraguan entrepreneurs suddenly to terminate the contracts (imports or exports) that had been reached with new partners on a less advantageous basis than with traditional United States partners, etc., nor to automatically renew their old long-term contracts with United States firms that had been terminated by the embargo. The entrepreneurs had already lost their representation and distributorship contracts which represented a financial loss for them in and of itself.

239. In abstract terms, it would perhaps be possible to develop an econometric model to calculate the medium- and long-term effects of only the first year of the embargo. But such an enterprise would be extremely difficult and divorced from reality since, as the embargo remained in force, it is practically impossible to distinguish the damage caused by the first year of the embargo from that due to its subsequent application. It is possible, however, to calculate the consequential cost of the losses due to the embargo on the nation's Gross Domestic Product.

240. In these conditions the Nicaraguan Government suggests that it would appear reasonable to calculate the compensation due to it on the basis of the total production losses which occurred during the first two years of the embargo, that is, from 1 May 1985 to 30 April 1987, as well as their impact on GDP for those years, and not to take subsequent losses into account. These losses may be evaluated precisely according to the method described and applied in Annex III.2. Thus calculated, the amount totals US$26,930,000. In Chapter 6 the consequent decline in the GDP is presented.

241. In addition, as explained above (paras. 237-238), the qualitative aspects

of the harm caused by the embargo have not been included. It should be borne in mind that familiarity with suppliers, access to inventories of spare parts and consumer goods of North American origin, were essential for an industry and an agriculture developed on the basis of the technology of that country. The embargo provoked a major dislocation of the whole economic system of Nicaragua, the effects of which have not yet been foreseen in their totality, even though they have been manifestly present ever since the embargo began. Similarly, however difficult it may be to ascertain the social cost of the embargo, the latter undeniably exists.

242. Thus, for example, in spite of apparent exceptions in United States Regulations (see Ann. IX.8, ss. 540.539 and 540.540), the health sector has been especially affected. Many medical supplies could not in fact be purchased; this was the case, for example, for oral proteins, anaesthetics, coagulating agents, some antibiotics, etc. In relation to the maintenance of hospital equipment, Nicaragua was also seriously affected since equipment comes mainly from the North American market. All this had very negative consequences for the health of the population (see Ann. III.2, pp. 22-23). In the same spirit it must be stressed that the United States Administration harassed humanitarian organizations and more often than not denied export licences they needed (for an example, see Ann. IX.7, pp. 2-4)[1].

(c) *Conclusion*

243. The Nicaraguan Government is thus able to assess the losses it has incurred as a result of the embargo as follows:

– US$22,864,000	for losses in commodity exports.
US$193,365,000	for losses related to imports.
US$11,261,000	for losses in currency revaluation and financial intermediation.
US$26,930,000	for losses in production due to the embargo.

These four categories are summarized and set out by year of incidence in Annex III.2, Table 14, page 27. Their combined total is US$254,420,000.

244. The actualization of these losses to their present value in 1988 (see Ann. VI.2 for methodology) gives a total actualized loss of US$325,400,000.

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[1] The Government of Nicaragua respectfully suggest that this element be taken into consideration when assessing the moral damages requested by Nicaragua.

CHAPTER 6

LOSS CAUSED TO DEVELOPMENT POTENTIAL

Introduction

245. In its Judgment of 27 June 1986, the Court decided, by twelve votes to three:

> "That the United States of America is under an obligation to make reparation to the Republic of Nicaragua for *all injury* caused to Nicaragua by the breaches of obligations under customary international law enumerated above" (Case concerning *Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1986*, p. 149, Dispositif, subpara. 13; italics added).

and, by fourteen votes to one:

> "That the United States of America is under an obligation to make reparation to the Republic of Nicaragua for *all injury* caused to Nicaragua by the breaches of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956." (*Ibid.*, subpara. 14; italics added.)

246. These decisions are in keeping with the Court's jurisprudence according to which:

> "Reparation must, as far as possible, wipe out all the consequences of the illegal act . . ." (*1928, P.C.I.J.*, Case concerning the *Factory at Chorzów* (Indemnity) (Merits), *Series A, No. 17*, p. 47 — see Chap. 1.)

247. Nevertheless, if consideration were given only to the damage described in the previous chapters, Nicaragua would not receive reparation "*for all injury*" sustained and the reparation would not "*wipe out all consequences*" of the "illegal" acts committed by the United States and considered by the Court. These acts had, in effect, real and extremely adverse consequences for Nicaragua's economy and for its economic and social development potential.

248. So far, the Nicaraguan Government has established that it has sustained — and, in several cases, continues to sustain — the following injuries due to the unlawful acts perpetrated by the United States:

human suffering,
material destruction of property,
production losses, and
loss of export earnings or increased cost of imports, as a consequence of the trade embargo.

Wherever possible, it has calculated the amount of damage incurred and, accordingly, the compensation due to it on that account. It also has established the amount of the additional government spending that has been necessary to defend the country against the United States military and paramilitary activities.

249. The characteristic shared by these categories of damage is that each of them may be traced back to one or more of the United States activities that the Court has held to be contrary to international law: the mining of the ports has led to destruction and loss in fishing income; the embargo is responsible for particular production losses or shortfall in export earnings, etc. But the damages

sustained by Nicaragua are much greater than this analysis alone would show. Each particular injury has direct negative repercussions on other types of activity and, when taken together, they have a cumulative effect upon Nicaragua's economic and social development.

250. The nature of this form of harm may be examined from two different points of view; and for the sake of clarity, the economic and the social aspects will be presented one after the other.

251. First, the unlawful acts of the United States have directly led to a reduction in the Gross Domestic Product (GDP) of Nicaragua, that is to the sum of the value added by each branch of the economy to the resources at its disposal. As a consequence of the production losses — which are established in the previous chapters —, the economy has less foreign exchange at its disposal and the productivity of nearly all sectors has been affected. This is what may be called the "GDP loss".

252. Secondly, these unlawful acts by the United States have had very dramatic effects on the health of the population, the education of future generations, housing, the transport infrastructure, etc. These negative social effects may be grouped under the general title of "social losses".

253. It has been relatively easy to assess the first of these two categories of damage (GDP loss); on the other hand, the social losses are more difficult to calculate precisely, although they unquestionably exist.

254. Before proceeding to describe in detail and, when possible, to make an assessment of harm caused to Nicaragua's economic and social development, it is necessary to establish the principle of the obligation to make reparation, which is incumbent upon the United States.

Section A. The Obligation to Make Reparation

255. In accordance with the general principle of customary law that has at present found expression in Article 1 of the International Law Commission draft articles on State Responsibility, "Every international wrongful act of a State entails the international responsibility of that State". Consequently, any damage that originates in an internationally wrongful act obliges the States to which that act may be attributed to make reparation, as expressed in Article 6 of the second part of the draft articles prepared by Professor Riphagen and which the International Law Commission adopted provisionally in 1986.

256. This fundamental rule is fully applicable to the damage caused to Nicaragua's economic and social development as briefly defined above, under the most traditional principles of international law. See subsection (*a*), *infra*. Contemporary economic and social development and its resulting legal consequences confirm and strengthen this interpretation. See subsection (*b*), *infra*.

(a) *In Accordance with Traditional Principles of International Law the United States is Required to Make Reparation of the Damage Caused to Nicaragua's Development Potential*

(1) *The nature of the damage caused to Nicaragua's development potential is such as to require reparation*

257. The obligation to make reparation automatically springs from the principle of integral and effective reparation (see Chap. I) which the Court established in subparagraphs 13 and 14 of the Dispositif of 27 June 1986 (see *supra*, para. 1).

258. It is particularly well established that compensation is due not only for the destruction itself (*damnum emergens*), but also for the resulting loss (*lucrum cessans*) (see Chap. 2).

259. The rule of contemporary jurisprudence is well expressed by arbitrator Asser in the *Cape Horn Pigeon* case:

> "Considering that the general principle of civil law according to which the damages should include an indemnity, not only for the loss suffered, but also for the profit of which one has been deprived, is equally applicable to international litigation, and that in order to apply it, it is not necessary that the amount of the profit of which one is deprived should be exactly determined, but that it suffices to show that in the natural order of things one would be able to realize a profit of which one is deprived by the act which gives rise to the claim;
>
> Considering that in this case it is not a question of indirect damage, but of direct damage, the amount of which should be estimated." (29 November 1902, *RIAA*, IX, p. 65.)

260. Under this principle, the arbitrator ordered Russia to pay compensation for the loss of the fishing season caused by the unlawful seizure of the *Cape Horn Pigeon*. (See also, the *William Lee* case, Mixed Claims Commission, *U.S. v. Peru*, 27 November 1863, *RIAA*, II, pp. 286-287; the sentence rendered by F. de Martens in the case of the *Costa Rica Packet*, 25 February 1897, Moore, *I. Arb.*, pp. 4949 et seq.; and examples quoted by Whiteman, *Damages in International Law*, 1937, pp. 1251 et seq.)

261. International arbitral tribunals have also ordered compensation to be paid for lost crops (the *Poggioli* case, 1903, *RIAA*, X, p. 669; *Feuillebois* case, Mixed Claims Commission, *France v. Mexico*, 15 June 1929, *RIAA*, V, pp. 543-544), or for the loss of possible profit caused by the unlawful disturbance to the normal course of business. Thus in the *Irene Roberts* case, Commissioner Bainbridge declared:

> "Under these circumstances, well-established rules of international law fix a liability beyond that of compensation for the direct loss sustained (...). The derangement of Mr. Quirk's plans, the interference with his favourable prospects, his loss of credit and business, are all proper elements to be considered in the compensation to be allowed for injury to be sustained." (1903, Ralston, *Venezuelan Arbs.*, p. 145.)

262. This position was also adopted by the Permanent Court of International Justice in the *Chorzów Factory* case. After laying down the rule on effective reparation (see Chap. 1) the Court continues:

> "This conclusion particularly applies as regards the Geneva Convention, the object of which is to provide for maintainance of economic life in Upper Silesia on the basis of respect for the *status quo*. The dispossession of an industrial undertaking — the expropriation of which is prohibited by the Geneva Convention — thus involves the obligation to restore the undertaking and, if this is not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible. To this obligation in virtue of the general principles of international law, must be added that of compensating loss sustained as the result of the seizure." (*1928, P.C.I.J., Series A, No. 17*, pp. 47-48; see also the dissenting opinion of Lord Finlay, p. 71.)

263. Further, the Court did not exclude

> ". . . the possibility of taking into account *another damage* which the Companies may have sustained owing to dispossession, *but which is outside the undertaking* itself" (*ibid.*, p. 49; italics added).

It is clear that the Court had in mind not only the loss of profit directly incurred by the companies in question but also the negative repercussions they may have suffered as a result of the unlawful dispossession. This appears from the nature of the questions that the Court submitted to the experts it had appointed. After asking them to evaluate

> "the financial results, expressed in Reichmarks current at the present time (profits and losses) which would probably have been given by the undertaking thus constituted from July 3rd, 1922, to the date of the present judgment, if it had been in the hands of the said Companies",

it instructed them to determine the value of the undertaking if it "had been developed proportionally on lines similar to those applied in the case of other undertakings of the same kind . . ." (*ibid.*, pp. 51-52).

264. The parties finally settled the case by negotiation (cf. *Order of 25 May 1929, P.C.I.J., Series A, No. 19*), so the Court did not have to reach conclusions as to the existence and amount of the injury. But the quoted passages in its Judgment of 13 September 1928 demonstrate that such injury could include not only the profit losses of the plant itself but also the negative repercussions of the latter on all the other activities of the enterprise.

265. The Court's Judgment in the *Chorzów Factory* case was interpreted in this manner by the United Kingdom in its Memorial in the *Anglo-Iranian Oil Co.* case. After quoting the Judgment of 1928, it adds:

> "According to these principles, the compensation would have to cover the value of all the property of the Company in Iran of which the Company has been deprived as a result of the confiscation of this property by the Iranian Government (this constituting the value of the investment which the Company had made in Iran — *damnum emergens*), and in addition compensation for all the loss of prospective profits which the Company had suffered (*lucrum cessans*). *Under this heading of loss of profits would be included not merely an estimate of loss of profits which the Company had lost by the cessation of the Iranian portion of its enterprise, but the loss which it had suffered* (including, if necessary, the extra expense in which it would be involved) *by the reason of the fact that the non-Iranian portion of its enterprise with which the Company is left would be an ill-balanced truncated portion of what was designed to be a part of one balanced whole, and would, therefore, be far less valuable as a truncated portion as compared with its value as part of a whole.*" (*I.C.J. Pleadings*, 1952, pp. 117-118; italics added.)

See also Salvioli, *op. cit.*, who, in analysing Judgment No. 13 of the Permanent Court, makes a clear distinction between lost profits *stricto sensu* (pp. 261, et seq.) and compensation due in the absence of the "*développement normal de l'entreprise*" (the undertaking's normal development), page 239.

266. These principles are logically applicable to the present case. Indeed, they are applicable *a fortiori* in the present case. As regards the type of loss with which the present chapter is concerned, it is similar in nature, for Nicaragua, to the damage caused the Bayerische and Oberschlesische Stickstoffwerke companies, which were the owners of the Chorzów plant in the case judged by the

Permanent Court in 1928. Nicaragua has suffered loss of production caused by the wrongful acts perpetrated by the United States. In turn, those losses have directly affected its economy and development potential as a whole. The resulting damage must thus be compensated.

267. Two factors justify consideration of the damage caused by the international wrongful act of a State to the economy and development potential of another State. First, this involves an assault upon one of the main components of the modern State. Secondly, the degree of gravity of a breach in international law in the case of a failure to respect the duty of *due diligence* in the protection of foreigners cannot be compared to a predetermined policy, decided at the highest governmental level, of deliberately harming another sovereign State (see Chap. 2). There is no doubt that the unlawful action of the United States had the very object of damaging the Nicaraguan economy and development potential (see Chap. 5, paras. 156-163).

268. The Arbitration Court on *Damages to Portuguese Colonies* held:

> "[I]l ne serait pas équitable de laisser à la charge de la victime les dommages que l'auteur de l'acte illicite initial a prévus et peut-être voulus, sous le seul prétexte que, dans la chaîne qui les relie à son acte, il y a des anneaux intermédiaires" (1928, *RIAA*, II, p. 1031)[1].

(ii) *The question of causality*

269. As explained by Edwin B. Parker, Umpire of the American-German Claims Commission of 1922 in the case of the *War-Risk Insurance Premium Claims*, the word "indirect" is "inapt, inaccurate and ambiguous" and the

> ". . . distinction between 'direct' and 'indirect' damage is frequently illusory and fanciful and should have no place in international law" (*RIAA*, VII, pp. 62-63; see also Garcia-Amador, 6th Report, *op. cit.*, para. 159, p. 40).

270. The applicable principle has been fixed with great clarity in administrative decision No. 2 of the American-German Commission of 1 November 1923:

> "The proximate cause of the loss must have been in legal contemplation the act of Germany. The proximate result or consequence of that act must have been the loss, damage, or injury suffered. The capacity in which the American national suffered — whether the act operated directly on him, or indirectly as a stockholder or otherwise, whether the subjective nature of the loss was direct or indirect — is immaterial, but the cause of his suffering must have been the act of Germany or its agents. This is but an application of the familiar rule of proximate cause — a rule of general application both in private and public law — which clearly the parties to the Treaty had no intention of abrogating. It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany's act and the loss complained of. It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably, and definitively traced, link by link, to Germany's

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[1] It would not be fair to leave the victim to bear the consequences of damages that the perpetrator of the initial unlawful act has provided for and perhaps even intended, simply on the pretext that in the chain connecting them to his act there are intermediate links.

> act." (*RIAA*, VII, pp. 29-30; see also the award of the German-Portuguese Arbitration Court of 31 July 1928, mentioned above, para. 38.)

271. Contemporary doctrine concurs with this view:

> "Whenever an international liability arises, there is a duty to make complete compensation and therefore for all the prejudicial consequences of the occurrence giving rise to the liability whether the damage thus ensuing is direct or indirect." (Yntema, *op. cit.*, p. 153.)
>
> "All damages which can be traced back to an injurious act as the exclusive generating cause, by a connected, though not necessarily direct, chain of causation, should be compensated." (Eagleton, *The Responsibility of States in International Law*, 1928, p. 202.)
>
> "Doivent être considérés comme conséquences de l'acte dommageable et doivent par conséquent être pris en considération pour l'appréciation de l'étendue de l'obligation de réparer, tous les faits qui sont reliés à l'acte originaire par un lien de cause à effet, en d'autres terme tous les faits desquels on peut remonter jusqu'à l'acte primitif par une chaîne ne présentant aucune solution de continuité."[1] (Personnaz, *La réparation du préjudice en droit international*, 1938, p. 136.)

(See also A. Hauriou, "Les dommages indirects dans les arbitrages internationaux", *RGDIP*, 1924, pp. 203-231, *passim*, in particular p. 227; Salvioli, *op. cit.*, pp. 224 and 246; Jiménez de Aréchaga, *op. cit.*, pp. 568-569; Bollecker-Stern, *op. cit.*, pp. 221 et seq.; Verzijl, *International Law in Historical Perspective*, 1973, pp. 743 and 756; I. Brownlie, *op. cit.*, pp. 225-227; Nguyen Quoc Dinh, Daillier et Pellet, *Droit international public*, 1987, p. 697; etc.)

272. The position was aptly summed up by the Government of the Netherlands in its reply to the questionnaire of the Preparatory Committee of the Hague Conference in 1930:

> "Sans faire de distinctions plus ou moins artificielles de 'dommage direct' et 'dommage indirect', il faut indemniser le dommage qui doit être considéré comme étant la conséquence du fait imputé à l'Etat"[2] (SDN, *Publications*, C.75 (a), M.69 (a), 1929, V, p. 149).

273. The causal relationship is thus the only condition for the compensation of damage caused by an internationally wrongful act in international law. This condition is without doubt fulfilled in the present case.

274. The acts perpetrated by the United States and held by the Court to be contrary to international law are the determining cause of the GDP loss and the social losses that have affected Nicaragua since 1981.

275. There are two ways of establishing this causality. The first is to take each of the acts for which the United States is responsible and determine the harmful consequences for Nicaragua. The second is to start from the losses incurred by Nicaragua and trace them back to their original cause. Both approaches lead to the same conclusion: the United States has caused enormous harm to Nicaragua, and it has done so deliberately.

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[1] The following should be regarded as the consequences of the injurious act and thus be taken into consideration in assessing the obligation to make reparation: all facts related to the original act by a causal relationship, or in other words, all facts which lead up to the initial act by a chain which presents continuity.

[2] Without making the more or less artificial distinction between "direct" and "indirect" damage, reparation must be made for the damage which must be regarded as the consequence of the act attributed to the State.

276. The Government of Nicaragua will cite two examples of the first of these approaches:

277. (i) On 13 September 1983, "an underwater oil pipeline and part of the oil terminal at Puerto Sandino were blown up" and on 15 October 1983 "the underwater pipeline was again blown up" (*Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment, I.C.J. Reports 1986*, p. 48). The Court recognized that these attacks were attributable to the United States (*ibid.*, p. 50) and in breach of both the principle of international customary law which bans the use of force in international relations, the obligation not to violate the sovereignty of Nicaragua, and the Treaty of Commerce, Friendship and Navigation of 21 January 1956 (*ibid.*, Dispositif, subparas. 4, 5, 10 and 11, pp. 147-148).

278. As Nicaragua has demonstrated in Chapter 3 above, damages caused by these attacks to petroleum installations and the resulting loss of petroleum amount to US$410,000.

279. However, this amount represents only a small part of the loss incurred by Nicaragua as a result of the attacks on Puerto Sandino. It must be recalled that virtually all oil imported by Nicaragua arrives at Puerto Sandino and proceeds from there to Managua through a pipeline. Hence, the loss of petroleum that was being stored in Puerto Sandino and the unavailability of the oil terminal for several months had immediate repercussions on a large number of industrial activities, in particular the chemical industry and electricity generation. In turn, the reduction of electrical power supplies led to reduced activities in many industries, whence a more general reduction in the gross national product and in the population's standard of living. Moreover, the need to replace the lost oil and to rebuild the destroyed installations has prevented the Government of Nicaragua from making other productive purchases abroad and generating the value added from combining the imports with domestic resources.

280. (ii) The same is true of the trade embargo imposed by the Executive Order of the President of the United States on 1 May 1985 (Ann. IX.1), which the Court declared contrary to the object and purpose of the FCN Treaty of 1956 and to the obligations of Article XIX of that Treaty (*I.C.J. Reports 1986*, pp. 138, 140 and subparas. 10 and 11 of the Dispositif, p. 148).

281. The Nicaraguan Government has demonstrated in the previous chapter that this unlawful action caused the irreparable loss of perishable goods, reductions in export earnings, much higher import costs, and production losses directly linked with the inability to export. The resulting loss due to losses from the general embargo on trade (US$254.4 million) and the GDP losses denied therefrom (US$381.6 million) amounts to at least US$636 million.

282. Yet again, this amount is far from sufficient to cover the actual loss incurred by Nicaragua. The fall in activity was not confined to export-oriented agricultural and industrial production. These economic activities are also consumers of goods and services produced in Nicaragua, whose producers were also affected by the embargo. Furthermore, the income of the farmers, workmen and entrepreneurs in those industries was reduced: their purchases, savings and investment accordingly fell.

283. Here again, the immediate and direct source of these negative repercussions is to be found in the general trade embargo imposed by the United States in breach of its international obligations. The causal relationship between the internationally wrongful act and the damage is thus amply demonstrated.

284. Many more examples could be supplied, either in connection with the use of force by the United States against Nicaragua as in the mining of the ports, or the damage caused by the United States breach of the principle of non-

intervention, as found by the Court, by the "Support given ... to the military and paramilitary activities of the *contras* in Nicaragua". (*I.C.J. Reports 1986*, para. 242.)

285. However, as indicated above (para. 275) this causal relationship may also be established adequately in another manner, by starting not from each of the wrongful acts attributable to the United States but from the damage which was incurred by Nicaragua, and following the chain of circumstances that caused it.

286. It is relatively easy to determine, on the basis of reliable and objective international sources, the amount of GDP loss.

287. A rigorous evaluation of Nicaragua's growth prospects was carried out in 1981 by an official mission of the World Bank when relations with the Government of Nicaragua were normal. *Nicaragua — The Challenge of Reconstruction* (deposited with the Court). This report indicated growth scenarios for the upcoming years. The question arises as to why the development forecast in that careful study was not achieved.

288. The World Bank was fully aware of the reconstruction policy being carried out since 1979 by the Government and they made explicit reference to the objectives and methods it had set itself. In the synopsis which appears at the beginning of the document it is stated:

> "The behaviour of the economy during the recovery period is analysed, particularly with respect to the development of the major productive sectors, agriculture and industry, and to Government policies regarding money and credit, public finances, investment, and foreign borrowing." (*Ibid.* — see also for example pp. 4 et seq.)

289. Subject to certain adjustments necessitated by the situation of conflict imposed upon it by the United States, the Government of Nicaragua largely adhered to the economic policy envisaged in the report. (See Government of Nicaragua, *Economic Policy Guidelines, 1983-1988*, Fondo Internacional de Reconstruccion, Managua, 1982.) The report also mentions "the less favorable international environment expected for the 1980s" (see *ibid.*, p. 49). The deterioration in the economic climate cannot be held to be responsible for the present situation. The Bank was, moreover, quite aware of the vulnerability of the Nicaraguan economy to external shocks. "... Nicaragua is highly vulnerable to various shocks" (*ibid.*, p. 57). This analysis leads to the inescapable conclusion that it is the unlawful acts of the United States which explain why these forecasts could not be achieved. They are the main variables which the Bank's mission was not able to take into account.

290. Moreover, all economic analyses highlight the role of the hostile acts of the United States in the disappointing performance of Nicaragua's economy. The 1987 ECLAC study of Nicaragua's economy notes:

> "Throughout this report, the effects of the armed conflict during the last few years on the performance of the economy have been shown. Particularly during 1987 its repercussions have been one of the most adverse factors." (Ann. V.1, p. 7.)

The analyses of qualified economists point in the same direction (see, for example, S. Maxfield and R. Stahler-Sholk, "External Constraints" in Th. W. Walker, ed., *Nicaragua — The First Five Years*, 1985, pp. 245-264; or E. V. K. Fitzgerald, "An Evaluation of the Economic Costs to Nicaragua of U.S. Aggression: 1980-1984" in R. J. Spalding, ed., *The Political Economy of Revolutionary Nicaragua*, 1987, pp. 195-213).

291. The Nicaraguan Government does not deny, however, that in recent

years, some other factors have affected Nicaragua's development, but in a much less serious manner. These are principally the natural catastrophes from which the country has suffered, such as floods and drought in 1982. The former were assessed as causing some US$207 million worth of damage to infrastructure and housing (see CEPAL, *Repercusiones de los fenomenos meterologicos de 1982 sobre el desarrollo economico y social de Nicaragua* (E/CEPAL/MEX/1983/L.1), Mexico City, 1983). Nonetheless, the impact of these latter elements upon the Nicaraguan economy — which may be calculated in a reasonably precise manner — although considerable, are in no way comparable with the effects of the wrongful acts that are attributable to the United States. In any case, the method followed below to calculate the losses suffered by the Nicaraguan economy as a consequence of the wrongful acts of the United States is based on the economic results achieved, and thus already takes into account such exogenous factors.

292. In conclusion, the Government of Nicaragua wishes to stress that its demonstration of the existence of a causal relationship between the damage and the internationally wrongful acts committed by the United States is in conformity with the traditional practice of international tribunals.

293. Hence in the *Cape Horn Pigeon* case, Arbitrator Asser observed:

> "... that it suffices to show that *in the natural order of things* one would be able to realize a profit of which one is deprived by the act which gives rise to the claim" (29 November 1902, *RIAA*, X, p. 65 — italics added); see also 30 December 1896, the *Fabiani* case, in La Fontaine, *Pasicrisie internationale*, p. 165; the Tribunal stated that the damage must be valuated according to "*le cours ordinaire des choses*" ["the ordinary course of events"].

294. This was also the attitude of the Permanent Court in the *Chorzów Factory* case. In its Judgment of 13 September 1928, the Court instructed the experts it had designated to envisage "hypothetically but probably" the results that the enterprise would have achieved if "it had been able to continue its *supposedly normal development*" (*1928, P.C.I.J., Series A, No. 17*, p. 52 — italics added).

(b) *The Legal Relevance of Contemporary Economic and Social Trends and Emergent Principles of International Law*

295. However, the interpretation and application of traditional principles of international law

> "... cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover an international instrument [as well as an international rule] has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation" (I.C.J., Advisory Opinion of 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia* ..., *I.C.J. Reports 1971*, p. 31; see also Advisory Opinion of 16 October 1975, *Western Sahara*, *I.C.J. Reports 1975*, p. 32).

296. Trends in international law reflecting contemporary political, economic and social changes have strengthened the conclusions in subsection (*a*), above. First, the inevitable interaction of contemporary economies justifies consideration of the impact of the breaches of law committed by the United States (i); and secondly, the emphasis on development and the new international economic order confirm that the attacks upon Nicaragua's economic and social development potential have to be compensated (ii).

(1) *The interaction of contemporary economies*

297. Traditional jurisprudence takes account of the general economic and social context surrounding the damages for which reparation was requested (see *supra*, paras. 246 et seq.).

298. In the *Chorzów Factory* case, the Permanent Court was mindful that the object of the Geneva Convention of 15 May 1922 concerning Upper Silesia was to ensure "the maintenance of economic life in Upper Silesia" (*1928, P.C.I.J., Series A, No. 17*, p. 47). Such concerns are even more valid when the national economy itself is threatened (see *supra*, para. 265 and Chap. 5, secs. A and B).

299. Today, whatever the nature of the economic and social system — capitalist, socialist or mixed — the State bears responsibility for national economic prosperity. This basic conception which is reflected most prominently in the system of national accounts (see United Nations Statistical Office, *A System of National Accounts: Studies in Methods*, Series F, No. 2, Rev. 3, New York, 1968) necessarily affects the development of the law.

300. Professor Paul Reuter, among others, has applied this idea systematically in the field of international law on State responsibility. Thus, according to this author:

> "Le préjudice de l'Etat et celui du particulier, lorsqu'il s'agissait d'une perte patrimoniale privée, étaient parfaitement distincts à l'époque libérale. Mais la collectivisation des risques par l'assurance facultative, puis obligatoire, patrimoniale puis sociale — les nationalisations l'accroissement massif du prélèvement fiscal sur le revenu national, — toutes les manifestations de la compénétration de la richesse nationale et de la richesse privée, symbolisées techniquement par la comptabilité nationale, ont fait de la fiction une réalité — une perte individuelle est aussi une perte collective et l'Etat est plus encore le représentant de la collectivité nationale que le titulaire de biens propres."[1] (P. Reuter, *La responsabilité internationale*, 1956, p. 110; see also *Droit international public*, 4th ed., 1973, p. 189, and "Le dommage comme condition de la responsabilité internationale", in *Estudios de Derecho Internacional — Homenaje al Profesor Miaja de la Muela*, 1979, Vol. II, 842.)

301. Similarly, in his separate opinion in the *Barcelona Traction, Light and Power Company, Limited*, case, Judge Gros says:

> "[T]he economic world today exhibits phenomena of State intervention in and responsibility for the economic activity of the subject within the national territory or abroad which are so frequent and thoroughgoing that the separation of the interest of the individual from that of the State no longer corresponds to reality." (*I.C.J. Reports 1970*, p. 269.)

302. In modern circumstances, it is proper to take into account all the negative economic consequences caused by the wrongful acts of one of the parties, to the other party. For States, their global economic losses *mutatis mutandis* represent the equivalent of the traditional *lucrum cessans*.

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[1] The prejudice of the State and that of the individual, in the case of private loss of assets, were perfectly distinct from one another during the liberal period. However, the collectivisation of risks by optional — then compulsory patrimonial, then social insurance — nationalizations — the massive increase of tax levies on national income — all these being signs of the merging of national and private wealth, technically symbolized by national accounts, have turned fiction into reality: an individual loss is also a collective loss and the State is much more the representative of the national community than the owner of its own wealth.

303. These principles have been formally adopted on many occasions in contemporary law.

304. Thus, for example, Article 91 of Additional Protocol No. I of 1977 to the Geneva Conventions of 1949 stipulates:

> "A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

This provision, which had been the object of an amendment submitted at a late stage by Vietnam at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, should be read in the light of its *travaux préparatoires*.

305. The latter are summarized by Professor Ph. Bretton:

> "Le représentant de la RSVN justifia l'insertion de cette disposition dans le protocole I en faisant valoir qu'elle s'imposait pour réparer les destructions et les dommages résultant des guerres d'agression coloniales et néo-coloniales imposées par l'agresseur sur le territoire même de peuples faibles et mal armés, dans des pays d'Asie, comme ce fut le cas au Vietnam, et dans des pays d'Afrique." [CDDH/I/SR67, 26 avril 1977, p. 2.] "Du point de vue juridique, il est intéressant de relever que les dommages visés par l'auteur de ce texte comprenaient à la fois les dommages directs *et* les dommages indirects résultant du retard préjudiciable au développement de l'économie nationale."[1] ("L'incidence des guerres contemporaines sur la réaffirmation et sur le développement du droit international humanitaire applicable dans les conflits armés internationaux", *Clunet*, 1978, p. 243.)

306. This text was adopted by consensus both in the Commission and in plenary session, that is without opposition from the United States — which, moreover, also failed to oppose the adoption of resolution 32/3 of the United Nations General Assembly of 14 October 1977 concerning aid for the reconstruction of Vietnam.

307. Thus in the framework of law applicable to international armed conflicts, it is for the whole of the damage caused to the economies of victim States that reparation is due, including that resulting from "prejudicial delay in the development of the national economy".

308. Furthermore, in connection with several recent affairs connected with acts of aggression or unlawful intervention in the domestic affairs of various States, the Security Council set up missions to assess the damage caused by these wrongful acts. In all cases, the damage caused to the development potential of the country concerned has been taken into account by the fact-finding mission, even when the latter had stated its inability to make a precise evaluation of the amount in question when it handed in its report:

> in 1977, the consultant experts designated under resolution 405 of the Security Council to assess damage caused by the attack of 16 January 1977 against

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[1] The representative of the SRVN justified the insertion of this provision in Protocol I on the grounds that it was necessary in order to compensate for the destruction and damage caused by colonial and neo-colonial wars imposed by the aggressors on the actual territory of weak and poorly armed peoples, in the countries of Asia, as was the case in Vietnam, and in countries of Africa. Legally speaking, it is interesting to note that the damage referred to by the author of the text includes both direct and indirect damage caused by "the prejudicial delay in the development of the national economy".

Benin took into account the "consequences of the aggression on the national economy" (because of the lost working hours and psychological climate of fear), the threat to the country's development and extra expenditure incurred for security purposes (doc. S/12415, pp. 30 et seq.);

in 1980, the Special Committee set up under resolution 455 of the Security Council of 23 November 1979, in assessing damage caused to Zambia by the acts of aggression of the Smith régime in Rhodesia, took account not only of material damage and losses connected with exports and imports but also their repercussions on the Zambian economy as a whole (doc. S/13774, in particular p. 35);

in 1982, the report by the fact-finding Committee which had been set up under resolution 496 (1981) of the Security Council to calculate and assess the economic damage caused by the attacks of mercenaries in the Seychelles Islands was based not only on the cost of rebuilding the airport but also on the reduction in receipts of the tourist industry *and* on the multiplier effect of these losses on the whole of the economy (S/14905/Rev. 1, p. 54 and Ann. IV, pp. 85 et seq.);

in 1985, the mission sent to Botswana under resolution 568 (1985) of the Security Council referred not only to the loss of human life and personal injuries, and damage caused by South African attacks, but also the cost engendered by the climate of insecurity and additional security expenditure (S/17453, pp. 94 and 99);

in the same year, the fact-finding Committee set up under resolution 571 (1985) of the Security Council emphasized the damage to the Angolan economy caused by attacks from South Africa (S/17468, p. 134) and the Council demanded that South Africa should make full reparation to Angola (resolution 577 of 6 December 1985). (All relevant documents are deposited with the Court.)

309. These precedents are of obvious relevance in the present context. If the aforementioned interventions and attacks justified the taking into account of damage caused to the economic and social development potential of the victim States, this is *a fortiori* the case in view of the repeated armed attacks and the continuous interference in the domestic affairs of Nicaragua by the United States since 1981.

310. Moreover, in resolution 38/10 of 11 November 1983 concerning "the situation in Central America", the General Assembly

> "3. *Condemns* the acts of aggression against the sovereignty, independence and territorial integrity of the States of the region, which have caused losses in human life and irreparable damage to their economies, thereby preventing them from meeting the economic and social development needs of their people; especially serious in this context are:
>
> *(a)* The attacks launched from outside Nicaragua against that country's strategic installations, such as airports and seaports, energy storage facilities and other targets whose destruction seriously affects the country's economic life and endangers densely populated areas."

311. Thus, in conformity with the practice usually followed by the Security Council in affairs of this kind, the General Assembly, in relation to the case which is now before the Court, expressly considered that the damages suffered by Nicaragua included those which compromise the economic and social development of that country.

(ii) *The impact of international law of development and the requirements of the new international economic order*

312. Among the changes that international law has undergone over the last decades the most marked has probably been the spill-over of development considerations into the legal sphere. As Judge Bedjaoui has written:

> "Over and above the conflict of interests between industrialized States and States of the Third World, there is, all the same, a general agreement of principle between them, although doubtless for different reasons and leading to different action in each of the two groups, that the poor countries must develop, thus giving effect to the United Nations Charter which, already more than 30 years ago, made development an international problem par excellence, of concern for the whole world community." (*For a New International Economic Order*, 1978, p. 138.)

313. In 1970, Judge Jessup had already predicted that ". . . the law of international economic development will mature" (Judgment of 5 February 1970, separate opinion, *I.C.J. Reports 1970*, p. 166). As of now, it may be stated that law has greatly "matured" and it is international law as a whole which has now become impregnated by the concept of a "new international economic order" consecrated by the General Assembly in 1974.

314. Among the principles, adopted by consensus in 1974, on which the new order would be based are the following:

> "The right of every country to adopt the economic and social system that it deems the most appropriate for its own development",
> "Full permanent sovereignty of every State over its natural resources and all economic activities", and
> "The need for developing countries to concentrate all their resources for the cause of development" (United Nations General Assembly, A/RES/3201 (S-VI), Declaration on the Establishment of a New International Economic Order, 1 May 1974, para. 4 (*d*), (*e*) and (*r*)).

315. These principles, which firmly establish the right and duty of each State to develop freely according to the system it has chosen, are embodied in the Charter of Economic Rights and Duties of States of 12 December 1974.

316. In addition, and this is of particular relevance in the present case, the Declaration on the Establishment of a New International Economic Order proclaims:

> "The right of all States, territories and peoples under foreign occupation, alien and colonial domination or *apartheid* to restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources of those States, territories and peoples" (para. 4 (*f*)).

317. It is interesting to note that, in the situations covered by the aforementioned text, it is compensation for damage caused to the economic and social development potential of the countries considered that is demanded.

318. Another pertinent development of contemporary international law is connected with the recognition, for all peoples and human beings of a right to development of which, as spelled out by the General Assembly of the United Nations in the Declaration on the Right to Development of 4 December 1986, the realization

> ". . . requires full respect for the principles of international law concerning

> friendly relations and co-operation among States in accordance with the Charter of the United Nations".

319. As shown by Judge Keba M'Baye, the right to development is not a vague concept *de lege ferenda*. It is, without any possible doubt, part of positive international law (cf. "Le droit au développement comme un droit de l'homme", *H.R. Rev.*, 1972, pp. 503-534; "Le droit au développement" in the Hague Colloquium, 1979, *The Right to Development at the International Level*, 1980, pp. 88s; "Le droit au développement en droit international", *Mel. Lachs*, 1984, pp. 163-177; see also A. Pellet, "Note sur quelques aspects juridiques de la notion de droit au développement", in M. Flory, ed., *La formation des normes en droit international du développement*, 1984, pp. 71-85).

320. In the very recent past a Court of Arbitration consisting of three Judges of this Court gave particular recognition to the right of a people "to a level of economic and social development which fully preserves [its] dignity" (*Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*, 14 February 1985, *ILM*, 1986, Vol. XXV, No. 2, p. 302). Moreover, the Tribunal referred to "the economic preoccupations so legitimately put forward by the Parties" (*ibid.*).

321. Consequently, any breach of this right calls for reparation. Moreover, whenever a breach of international law has harmed the potential for economic and social development of a State, the damage must be compensated. The wrongdoer is responsible both on account of the initial breach and the breach of the resulting right to development. In cases of this kind, the obligation to make reparation has a two-fold basis.

322. In the present case, the United States has seriously injured Nicaragua's economic and social development potential (see *supra*, para. 231 to 233 and 277 to 290). At the same time, the United States violated Nicaragua's right to development in that it deliberately endangered the

> "... comprehensive economic, social, cultural and polical process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom" (Declaration on the Right to Development, Preamble, para. 2).

323. The United States obligation to make reparation is based both on breaches of international law attributed to the United States that caused damage to Nicaragua's potential of development, and on the actual existence of that damage, which infringes Nicaragua's right to development.

324. The United States is obliged to make reparation for the harmful consequences of its internationally wrongful acts, including GDP losses and social losses. The most recent principles confirm the conclusions derived from the application of the most traditional rules of *jus gentium* to the subject-matter.

Section B. Reparation Due to Nicaragua

325. As in the case of the other categories of injury to Nicaragua from the internationally wrongful acts of the United States, the cardinal principle is integral and effective reparation of the damage to Nicaragua's development potential (see Chap. 1).

(a) *The General Principles Applicable to the Evaluation of Damage Caused to Nicaragua's Development Potential*

(1) *General considerations on the extent of the damage*

326. As shown in Section A of Chapter 5, the Nicaraguan economy is extremely vulnerable due to its underdevelopment and trade exposure. These structural problems were exacerbated by the costs of fighting the Somoza dictatorship, which bled the country dry (*ibid.*). The combination of these two factors explains why this country was so susceptible to external shocks (see *ibid.*).

327. Despite these handicaps, the World Bank drew attention to the country's economic potential in its report of 9 October 1981, *The Challenge of Reconstruction*:

> "Nicaragua is favored by a number of conditions conducive to a high rate of economic growth. It has a low population/land ratio and abundant rich volcanic soils, its metal mining potential is good, and the core of the transport infrastructure network is well established." (P. 34.)

328. In 1979, the new government set itself the priority task of reconstructing the national economy with a view to bringing about social justice and by 1980 its efforts began to bear fruit (see Chap. 5, Sec. A).

329. Nevertheless, Nicaragua's development prospects are heavily dependent upon three factors:

- agriculture, which all experts agree is the principal motive force behind growth (see World Bank, *op. cit.*, pp. 34-35);
- guaranteed access to energy, in particular fossil fuel, which is the principal source of electrical energy (see *ibid.*, p. 34);
- transport, including roads to ports and airports, because of the crucial importance for the economy of foreign trade (see Chap. 5, *supra*, Sec. A).

One of the main objectives of the United States military and paramilitary activities was the weakening of these three sectors.

330. This destruction has undermined the country's economic structure. It thus has a long-term effect, and the breaches of international law are still continuing.

331. If, for example, a cornfield is burnt before the crops have been harvested, the crop is lost. This obviously places the farmer and his family in a difficult situation, but the loss of his output and his purchasing power has repercussions on the economic activities of other sectors. Yet, if assistance is given, a crop may be planted and harvested again in the following year.

332. A coffee plantation is more complicated: a coffee shrub produces coffee only after five or six years on average. Thus, after repeated acts of destruction or years of inattention due to fear of being killed, the coffee-grower must abandon his land and take refuge in the towns, where he will join the army of unemployed with all the attendant social and urban problems. The burning of forests has similar results.

333. In the same way, the destruction of a bridge may isolate an agricultural region completely, preventing it from trading in its produce with resulting loss in purchasing power for the peasants, supply difficulties for city dwellers, price increases which are practically impossible to prevent and resulting macro-economic and social effects.

334. The bombing of an oil plant causes the loss of the oil stored there and the expenditure of additional currency in order to replace it. While it is down,

the electric plant can no longer produce electricity and factories are paralysed, being compelled either to lay off their employees or to pay them for doing no work.

335. In each of these cases the loss for the Nicaraguan economy appears as a decrease in national output (measured as Gross Domestic Product — GDP) and can be analysed as the result of either a decline in export income or an increase of indebtedness. The losses by their very nature are spread over a period of several years. In the opinion of the Nicaraguan Government, there are two main consequences to be drawn from this from the legal point of view.

336. Thus, the losses incurred to date do not represent the appropriate amount of reparation. Unlike material damage *stricto sensu* (see Chap. 2) it is impossible to assess their replacement value. The only possibility is annual calculations of the loss in national income consequent upon the immediate losses from United States unlawful acts, as from 1982 to the present.

337. Secondly, the harmful effects of the wrongful acts of the United States have not ceased. In other words, although there is no doubt whatsoever that the prejudice exists and that it requires compensation, the complete evaluation of that prejudice is, at this stage, extremely difficult (for the conclusion which the Applicant State respectfully draws in this context, see Conclusion, *infra*, paras. 477 to 483).

(ii) *General rules for the evaluation of the prejudice caused to Nicaragua*

338. Any difficulty encountered in determining the amount of compensation should not serve as a pretext to refuse reparation. Otherwise the wrongdoer would be placed in a position of undue advantage.

339. The problem is quite different as regards the two aspects of developmental loss: the reduction in Gross Domestic Product consequent upon production and trade losses on the one hand and the social consequences of attacks and economic sanctions on the other.

340. The first category of such damage may be assessed in a fairly precise manner based on customary methods of econometric calculation. In the case of Nicaragua in particular, such an assessment is greatly facilitated by the macro-economic analysis model developed by the Instituto Latinoamericano de Planificacion Economica y Social (ILPES), a subsidiary body of ECLAC (Ann. IV.4).

341. The macroeconomic methodology summarized in Annex IV.3, for the evaluation of damage caused by the intervention and attacks of the United States (see Ann. IV.2 for an analysis of those consequences) applies the ILPES model in order to examine the negative effect on the economy as a whole of foreign exchange losses in exactly the same way as that in which the positive effect of a foreign loan is conventionally estimated.

342. The social costs of the United States internationally wrongful acts however, require a more specialized estimate. On this point the Nicaraguan Government summarizes relevant data (see Ann. IV.5) and presents the Court with a global estimate that takes into consideration the order of magnitude of the GDP loss.

343. The sum of US$1,190.5 million resulting from the application of the most relevant methodology for damages and production losses represents a strict minimum of the damage.

(b) *The Calculation of the Amount of Compensation*

(i) *GDP loss*

344. The methodology used to calculate damages caused by the United States

wrongful acts to the economy of Nicaragua is explained in Annexes I.2 and IV.3 to the present Memorial and Annex IV.2 applies that methodology. The use of the term "GDP loss" for this loss category refers to the loss of economic development potential in the wider sense. In the technical sense, the validity of the reference to Gross Domestic Product lies in the fact that the loss arises from value-added foregone, and that GDP is the sum of value-added in all the economic activities of an economy (United Nations Statistical Office, *op. cit.*).

345. The guidelines for this methodology are provided by the macroeconomic model of the Nicaraguan economy produced by ILPES (Ann. IV.4), a model which was constructed under a technical assistance programme funded by the United Nations Development Programme (UNDP) to improve the quality of routine economic policy analysis. This model, established in 1987, gives a general framework for analysing the trends of the Nicaraguan economy on the short- and medium-term. The method is based on econometric estimation of the behaviour of the major macroeconomic variables, and endeavours to take into account any relevant variable excluding *ceteris paribus*, the influence of all others (such as natural disasters, world market conditions, quality of economic administration, etc.). The model permits the calculation of the effects of variations in any macroeconomic variable (in this case, foreign exchange income) on GDP. It is similar to those constructed by ILPES for use in other Latin American countries. It has been used here to calculate the macroeconomic consequences of the material damages and production losses deriving from the wrongful acts for which the United States is liable. The results of this valuation are summed up hereinafter.

346. Each year's material damage and losses can be analysed as a foreign exchange loss, either as a decline in export income (in the sense that this production was not available for export), or as an increase of indebtedness (in the sense that Nicaragua was compelled to replace them with fresh imports). In both respects, they have been a burden on the balance of payments current account. Hence, the effects of this constraint on the Nicaraguan economy can be calculated in terms of demand restriction and restrictions on import capacity (see Ann. IV.3, pp. 2-4). The reduced availability of foreign exchange between 1982 and 1987, due to United States military and paramilitary attacks and other wrongful acts of the United States, means that production in all sectors of the economy was affected, and not just those where destruction and imminent production losses occur. In other words, the value which would have been added to the imported raw materials foregone, was not realized. The sum of these annual values added is the GDP loss.

347. The calculations have been made on a yearly basis. The total amount of GDP loss is US$1,582.7 million (see Ann. VI.1, Table 1).

348. This estimate does not contemplate the direct losses from the disarticulation caused by military mobilization and defence costs (see Chap. 4), nor the other measures taken by the Government of the United States such as the cut in sugar quota in 1983 or the financial harassment of Nicaragua by the United States (see Ann. IV.2).

349. Concerning the GDP loss, Nicaragua has used a method of evaluation based on the ILPES macro-economic model which allows the effects of United States aggression alone to be measured, independently both of exogenous phenomena such as natural disasters or climatic conditions, and of endogenous factors such as the economic policies of the Nicaraguan Government. The difference between the ILPES model estimates of GDP loss due to the war are congruent with the difference between the World Bank (1981) and the Interamerican Development Bank (1983) estimates of likely future performance and the actual performance in the context of the war.

350. It is possible to calculate the losses in export income and GDP (proposed as the basis of compensation by Nicaragua) due to United States military and paramilitary attacks and the trade embargo. If these losses are added to the actual record of exports and GDP during the 1982-1987 period, the result is what the Government of Nicaragua holds would have occurred had those illegal actions not taken place. The forecasts of the IBRD (*op. cit.*) and the IDB (*op. cit.*) reproduced in Annex IV.2 might be taken as a reasonable expectation of what would have happened to these variables in the relevant period under "normal" circumstances; but of course did not, due to the attacks. In fact, as Annex IV.2 (Tables 8 and 9) indicates, the results are of a similar order of magnitude.

351. For example, the mean of the IBRD "high" and "low" forecasts for normal circumstances made in 1981 for GDP in 1986 is US$2.59 thousand million; a difference of US$440 million above the GDP figure of US$2.15 thousand million actually achieved for that year. The GDP losses due to damage and production losses as well as the embargo for 1986 are US$529.7 million, a figure of a similar order of magnitude. Another example is the IDB export forecast (made in 1983) of US$719 million for 1986; while the outturn was in fact US$307 million, a difference of US$412 million. This figure is even greater than the production and embargo losses of US$353.1 million claimed by the Government of Nicaragua for 1986.

352. The two methods compared are different in nature. The main one, based on the ILPES model, includes only the losses in economic development potential from the material damages and the losses of production caused by the wrongful acts of the United States. The second method, which consists of a subtraction of the actual GDP from the projections made in 1981 by the World Bank is not selective. It includes all the causes of GDP losses, not only the wrongful acts of the United States, but also the natural catastrophes of 1982 and 1985 and the acts for which the United States has not been declared liable.

353. In the view of the Nicaraguan Government it is preferable to take into account the results given by the first method because it is independent of exogenous effects such as natural disaster. Nevertheless, those deriving from the second method may well be of interest to the Court as they indicate the comparable order of magnitude.

354. Nicaragua thus presents two claims in respect of GDP losses:

(i) The GDP (i.e., value-added) lost as a consequence of the production losses and material damage caused by United States military and paramilitary attacks between 1982 and 1987; which totals (see Ann. VI.1, Table 1) US$1,582.7 million.

(ii) The GDP (i.e., value-added) lost as a consequence of the commercial losses caused by the trade embargo between 1985 and 1987; which totals (see Ann. VI.1, Table 1) US$381.6 million. In combination, these two claims represent a sum of US$1,964.3 million in lost economic development potential. When these losses are brought to their 1988 present value (see Ann. VI.2) they are equivalent to: (i) US$2,058.3 million; and (ii) US$488.1 million, respectively; for a total of US$2,546.4 million.

(ii) *Social losses*

355. All United Nations bodies state that development is not a purely economic matter but "a comprehensive economic, social, cultural and political process"

(cf. A/RES/41/128, 4 December 1986, Declaration on the Right to Development, Preamble, para. 2).

> "[T]he ultimate aim of development is the constant improvement of the social situation of entire populations" (A/RES/41/142, 4 December 1986, *Implementation of the Declaration on Social Progress and Development*; see A/RES/2542 (XXIV), 11 December 1969).

356. There can be no doubt that the wrongful acts of the United States have had, and still have, enormous detrimental effects on the welfare and social progress of the Nicaraguan people. The first priority of the new government after the fall of the Somoza dictatorship was to increase the welfare of the people. The 1980 plan for reactivating the economy puts the emphasis on increasing the standard of living of the Nicaraguan people by meeting their basic needs, such as proper nourishment, healthcare, education, mass transportation and housing:

> "A real possibility will be opened to all Nicaraguans of improving the quality of their lives, through the establishment of a policy which tends to eradicate unemployment and makes effective the right to housing, health, social security, efficient collective transport, education, culture, sport and wholesome entertainment". (Ministerio de Planificacion, *Programa de Reactivacion Economica en Beneficio del Pueblo*, Managua, 1979, p. 106.)

357. During the first three years of the Revolution, these objectives were given high priority. Health and education accounted for 27 per cent of the budget for 1980, and 24 per cent in 1981, compared to 15 per cent in 1987, and encouraging results were obtained: a reduction to 13 per cent of the adult illiteracy rates owing to a massive national literacy campaign in 1980, construction of about 200 new primary schools in 1980-1981, and mass-vaccination and housing campaigns, etc. (see World Bank, *Nicaragua: The Challenge of Reconstruction*, Ann. X, pp. 32-33).

358. Although the Nicaraguan Government has maintained this social priority, the policy has been compromised by the wrongful acts of the United States. Not only have the rise in levels of social welfare attained in several fields not been maintained, but a certain regression has been registered. First, the destruction and production losses caused by the United States has reduced incomes generally. Between 1983 and 1987 *per capita* GDP has declined by 19 per cent and civilian government expenditure has fallen, which has inevitably affected nutrition and health, particularly that of children. (See Ann. IV.5.) Secondly, the trade embargo denied spare parts and foreign exchange to social service facilities and reduced their capacity to serve the population. This effect has been aggravated because the United States military and paramilitary activity has concentrated (see Chap. 5, Sec. A) its attacks on targets having especially strong social effects: destruction of harvests or schools, murders of teachers or of doctors and nurses.

359. Annex IV.5 to the Memorial describes some of the social consequences of the wrongful acts of the United States. The social data presented in the next paragraphs are taken from official Nicaraguan Government statistics (see Instituto Nacional de Estadistica y Censos, *Anuario Estadistico 1978* and *Anuario Estadistico 1986*).

360. *Health.* Since 1980, two hospitals have been built; 417 new primary care posts have been created; the number of doctors has increased by 58 per cent, the number of nurses by 211 per cent; infant mortality had been reduced from 120 per thousand to 75 per thousand; and poliomyelitis has been eradicated; etc.

361. However, since 1983 it has become increasingly difficult to meet the needs

of the population. The total losses of healthcare units amount to US$82.8 million. 60 doctors and 22 nurses have been murdered, kidnapped or wounded. Malnutrition has increased among the peasant population, especially children. The incidence of measles has risen throughout the country and, in the war zones, malaria has risen by 17 per cent.

362. *Education*. Between 1979 and 1983, in addition to the literacy campaign referred to above, the number of primary schools rose from 9,986 to 16,382 and enrolment from 369,000 to 565,000. Secondary enrolment rose from 98,874 to 158,215.

363. During the period 1984-1987, 67 schools were partially or totally destroyed at a cost of US$1.2 million, and 60,240 primary school students and 30,120 participants in adult education have been affected by the closure of 620 schools and 840 adult education collectives in the war zones. One hundred and ninety-eight teachers and 704 students have been murdered, kidnapped or wounded and the teaching personnel has declined. The school attendance rate has decreased while the illiteracy rate has risen again to over 24 per cent.

364. *Social Security and Welfare*. Before 1979, social security coverage had been limited to a small urban minority; but by 1986 over 358,000 families, about half the total population, enjoyed this coverage which was expanded in the cities and to the rural areas. Some 203 special attention centres had been established to attend to homeless children, the mentally handicapped and old people. Special schemes had been established to reintegrate discharged prisoners, prostitutes, etc., into society.

365. Between 1982 and 1987, the wrongful acts of the United States have damaged installations providing social services to the population to a cost of more than US$600,000. Due to the war, one-quarter of a million persons (7 per cent of the population) have been displaced; 11,241 children have been orphaned; thousands of families have been deprived of income because of the death of the head of the family; more than 4,000 persons handicapped by the war are dependent for their survival on government assistance over the long-term. The government has been obliged to allocate large amounts of money to the care of refugees and aiding the victims of the war. These financial expenses amount at least to US$31,159,239 in the period 1982-1987.

366. *Labour*. The workforce (Economically Active Population) of Nicaragua is of the order of 1 million persons, of whom about one-half are occupied in agricultural pursuits. Those in permanent employment received considerable increases in social benefit and a betterment of working conditions after 1979; while the self-employed gained access to land under the Agrarian Reform or were organized in small industrial cooperatives.

367. The United States military and paramilitary activities have seriously affected the labour situation in the country. Thousands of young men and women who would have formed part of the working population have been mobilized. Starting in 1985, a relative lack of labour power has begun to be felt in the formal sector of the economy. The situation is aggravated by the migration of 9,575 qualified professionals between 1979 and 1986, frightened by the situation created by the United States.

368. *Housing*. Before 1979, Nicaragua faced a dramatic situation in housing: the majority of the population lived in unhealthy houses with no electricity or running water. Between 1980 and 1986 some 7,000 houses a year have been built by the government, and many more families have benefited from "site and service" schemes providing sanitation and electricity. By 1986, 51 per cent of the population had access to potable water and 45 per cent to electric power; roughly double the proportions ten years earlier.

369. Between 1980 and 1987, more than 2,300 houses have been destroyed at

an estimated cost of US$13.2 million and tens of thousands of peasant families have been compelled to abandon their homes. Due to the war effort, housing construction cannot even keep up with population growth.

370. *Roads and mass transportation*: Improving the means of transport is an essential factor for raising the quality of life and standard of living. One thousand, two hundred and nineteen kilometers of new roads and 20 bridges were built between 1980 and 1986. In the same time the *contras* have destroyed 32 bridges (at a cost of US$1.5 million) and impeded the planned construction of hundreds of kilometers of new roads.

371. The cost of the purely material damage described above — destruction of healthcare facilities, of schools, of houses or of bridges — has already been included in the total cost of material damage (see Chap. 2). But, the social losses arising from the loss of these facilities are infinitely more difficult to evaluate with certainty.

372. In some cases a figure can be put on part of the cost of compensating the population. Thus it is estimated that the Nicaraguan Government has invested more than US$31 million in buying land, extending credit, building houses, health and education facilities, providing food and other social services, etc., for people displaced as a result of the war. But for most of these social losses, estimation is very difficult, but it is of the same order of magnitude of the closely related losses of economic potential. Therefore, the Court is requested to award Nicaragua a lump-sum of US$2,000 million as appropriate compensation for the enormous social losses it has suffered due to the wrongful acts of the United States.

Conclusion

373. As stated by the Court in its Judgment of 27 June 1986, "in a situation of armed conflict (. . .) no reparation can efface the results of conduct" contrary to international law (*I.C.J. Reports 1986*, p. 144). It is important that even if the reparation cannot "wipe out all the consequences of the illegal act" (*1928, P.C.I.J., Series A, No. 17*, p. 47) it should meet this objective as far as possible. And this is particularly true in a case of flagrant and persistent misconduct by the wrongdoing State.

374. The sums presented in this chapter represent only a minimum.

375. The GDP losses have been calculated in accordance with an internationally recognized method, on the basis of rigorous and objective data. Thus the amount of reparation owed by the United States on account of loss of development potential which their internationally wrongful acts have brought about for Nicaragua represents a minimum net present value GDP loss of US$2,546.4 million actualized to 1988. (See Ann. VI.2 for calculation.)

376. Similarly, as precise a description as possible has been given *supra* of the social losses brought about by the internationally wrongful acts of the United States. Given that these are of the same order of magnitude of the current GDP losses, the sum of US$2,000 million is claimed for the people of Nicaragua whose development potential has been seriously affected by United States military and paramilitary activities.

CHAPTER 7

REPARATION FOR THE VIOLATIONS OF THE SOVEREIGNTY OF NICARAGUA

A. Introduction: the Relevant Findings

377. Two of the findings which form part of the Dispositif of the Judgment on the Merits in the present proceedings relate expressly to the breach of the obligation under customary international law "not to violate the sovereignty of another State". These are the decisions in subparagraphs 5 and 6 of the Dispositif concerning overflights of Nicaraguan territory and the laying of mines in the internal or territorial waters of Nicaragua during the first months of 1984. In addition, subparagraph 5 includes violations of sovereignty caused "by the acts imputable to the United States referred to in subparagraph (4) hereof".

378. It is a truism that a Dispositif should be interpreted in the light of the Judgment as a whole, and in the present connection the significance of the Dispositif is clarified by the following passages from the Judgment:

> "251. The effects of the principle of respect for territorial sovereignty inevitably overlap with those of the principles of the prohibition of the use of force and of non-intervention. Thus the assistance to the *contras*, as well as the direct attacks on Nicaraguan ports, oil installations, etc., referred to in paragraphs 81 to 86 above, not only amount to an unlawful use of force, but also constitute infringements of the territorial sovereignty of Nicaragua, and incursions into its territorial and internal waters. Similarly, the mining operations in the Nicaraguan ports not only constitute breaches of the principle of the non-use of force, but also affect Nicaragua's sovereignty over certain maritime expanses. The Court has in fact found that these operations were carried on in Nicaragua's territorial or internal waters or both (paragraph 80), and accordingly they constitute a violation of Nicaragua's sovereignty. The principle of respect for territorial sovereignty is also directly infringed by the unauthorized overflight of a State's territory by aircraft belonging to or under the control of the government of another State. The Court has found above that such overflights were in fact made (paragraph 91 above).
>
> 252. These violations cannot be justified either by collective self-defence, for which, as the Court has recognized, the necessary circumstances are lacking, nor by any right of the United States to take countermeasures involving the use of force in the event of intervention by Nicaragua in El Salvador, since no such right exists under the applicable international law. They cannot be justified by the activities in El Salvador attributed to the Government of Nicaragua. The latter activities, assuming that they did in fact occur, do not bring into effect any right belonging to the United States which would justify the actions in question. Accordingly, such actions constitute violations of Nicaragua's sovereignty under customary international law." (*I.C.J. Reports 1986*, p. 128.)

379. In the light of the passages quoted above, the content of the Dispositif,

and the submissions of the Applicant State both in the Memorial and in the oral hearings, the United States has been found responsible for four distinct types of violation of the territorial sovereignty of Nicaragua. Whilst there is some overlap, in substance the violations generate four distinct forms of State responsibility relating to distinct causes of action (or heads of liability) and distinct aspects of the conduct of the United States.

B. The Mode of Reparation

380. In the case of what is sometimes called "moral injury" to the personality of the State the appropriate mode of reparation is usually described in the literature as "satisfaction". This may take one or more forms, including the presentation of official regrets and the punishment of the guilty officials: see, for example, Rousseau, *Droit international public*, V, Paris, 1983, pages 218-219, paragraphs 218-219; Nguyen Quoc Dinh, Daillier and Pellet, *Droit international public*, Paris, 1987, page 710, paragraph 508. Moreover, it is often pointed out that a mere judicial declaration of responsibility may play the role of "satisfaction", as in the *Corfu Channel* (Merits) case (*I.C.J. Reports 1949*, p. 4 at pp. 35, 36).

381. These elements will be familiar to the Court and the purpose of this pleading is not to rehearse the standard materials but respectfully to offer an important elucidation. On occasion the literature appears to exclude pecuniary reparation from the list of available forms of satisfaction: cf. Jiménez de Arechaga in Sorensen (ed.), *Manual of Public International Law*, London, 1968, page 572; Przetacznik, *Revue générale de droit international public*, Volume 78 (1974), pages 945-973. Such a position would surely be incompatible with sound legal principle and ordinary common sense. No doubt the forms of satisfaction *normally applicable* in negotiated bilateral settlements in respect of "moral damage" do not involve pecuniary reparation. But there are good reasons for this when the wrong is of a highly symbolic character (for example, an insult to the flag) and the reparation itself is appropriately symbolic.

382. The present case, however, is significantly different. The process of reparation is taking place within the framework of an adjudication, and the wrongs complained of fall within well-known causes of action which were specifically pleaded by the Applicant State and were the subjects of specific findings by the Court. As wrongs, they generate liability without proof of special damage, but as a matter of remedies they are eminently suitable for reparation by means of an appropriate pecuniary award.

383. The possibility of awarding pecuniary satisfaction for violations of sovereignty is not restricted in any way as a consequence of the decision of the Court in the *Corfu Channel* (Merits) case. In that case the Court, having held that the action of the British Navy known as "Operation Retail" constituted a violation of Albanian sovereignty, stated that: "This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction." (*I.C.J. Reports 1949*, p. 35; and see also *ibid.*, pp. 25-26.) The Court does not address itself to the question whether pecuniary reparation would be available in principle. However, the precise basis of decision is the fact that Albania had not claimed any sum of money, as the text of the Judgment makes clear:

> "The Albanian Government has not disputed the competence of the Court to decide what kind of *satisfaction* is due under this part of the Agreement. The case was argued on behalf of both Parties on the basis that this question

> should be decided by the Court. In the written pleadings, the Albanian Government contended that it was entitled to apologies. During the oral proceedings, Counsel for Albania discussed the question whether a pecuniary satisfaction was due. As no damage was caused, he did not claim any sum of money. He concluded [*translation*]: 'What we desire is the declaration of the Court from a legal point of view . . .'." (*I.C.J. Reports 1949*, pp. 25-26.)

384. A further consideration is the extreme improbability of the view that the law recognizes the award of moral damages exclusively as *accessory* to other damages (as in the *I'm Alone* case, *Reports of International Arbitral Awards*, III, p. 1609, at p. 1618), but does not accept the award of pecuniary reparation as the *principal form* of compensation for serious breaches of fundamental principles of customary international law. Indeed, most of the doctrinal opinion assumes that the forms of satisfaction include the payment of money: see Johnson, *British Year Book of International Law*, Volume 29 (1952), page 493; O'Connell, *International Law*, 2nd edition, London, 1970, pages 1114-1117; Rousseau, *Droit international public*, V, Paris, 1983, pages 219-220, paragraph 219; Guggenheim, *Traité de droit international public*, II, Genève, 1954, page 75; Brownlie, *Principles of Public International Law*, 3rd edition, 1979, page 461.

385. The ruling of the Secretary-General of the United Nations in the *Rainbow Warrior Affair* (*New Zealand* v. *France*) provides substantial support for the view that pecuniary compensation is an appropriate remedy for gross violation of the territorial sovereignty of a State: for the text see E. Lauterpacht, Q.C. (ed.), *International Law Reports*, Volume 74, page 256 (Ruling dated 6 July 1986). The circumstances are well known and all the essential facts were admitted by the French Government. Both Parties agreed to ask the Secretary-General for a ruling on their differences. In its Memorandum New Zealand claimed "compensation for the violation of sovereignty and the affront and insult that that involved" (*ibid.*, p. 259). This claim was separate from a claim in respect of cost resulting from France's unlawful acts. In response to the claims for compensation the Ruling of the Secretary-General awarded New Zealand US$7 million "as compensation for all the damage it has suffered" (*ibid.*, p. 271), and it is obvious that this finding was not confined to one particular aspect of the claim for compensation.

386. Thus the submission of the Government of Nicaragua is that the appropriate mode of reparation should be the grant of pecuniary satisfaction and that this submission is fully in accordance with the standards of contemporary international law and practice.

C. The Claim for the Four Forms of Violation of the Sovereignty of Nicaragua

387. The Judgment of the Court on the Merits has identified four distinct forms of violation of the sovereignty of Nicaragua: the conduct constituting breach of the obligation not to intervene in the affairs of another State (see the Judgment, para. 251), the conduct in breach of the obligation not to use force against another State (Dispositif, subpara. 5 referring to subpara. 4), the directing or authorizing of overflights of Nicaraguan territory (Dispositif, subpara. 5), and the laying of mines in the internal or territorial waters of Nicaragua during the first months of 1984 (Dispositif, subpara. 6).

388. These findings identify and are based upon four distinct causes of action. The literature of the law recognizes the significance of the separate causes of action in the context of State responsibility: see Jennings, 121 *Recueil des cours*,

(1967-II), pages 507-509; Jennings also in Cassese (ed.), *The Current Legal Regulation of the Use of Force*, 1986, page 326; Brownlie, *System of the Law of Nations: State Responsibility*, Part I, Oxford, 1983, pages 53-85. This approach reflects the practice of States in formulating Applications before the Court and the related submissions. Thus in the *Nuclear Tests* cases Australia claimed that three separate categories of rights had been violated by France's conduct of nuclear atmospheric tests in the South Pacific region (and that these rights were subject to legal vindication independently of material damage): see *I.C.J. Reports 1974*, pages 360-362, paragraphs 101-102 (joint dissenting opinion).

389. Moreover, in this same connection the Court is respectfully reminded that, in a joint dissenting opinion, Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock recognized (at least on a *prima facie* basis and for purposes of admissibility) that each separate claim engaged a distinct issue involving the question of "legal interest" and the content of a particular rule of customary international law: see *I.C.J. Reports 1974*, pages 363-371, paragraphs 105-118. A similar position was taken by the same Judges in the case of *New Zealand* v. *France*, *I.C.J. Reports 1974*, pages 519-522, paragraphs 48-54.

390. In the submission of the Government of Nicaragua, the liability of the Respondent State is generated independently by each of the four causes of action concerning the violation of its sovereignty. Each cause of action relates to a substantially distinct type of misconduct and the liability is therefore cumulative. On this legal basis, Nicaragua claims symbolic pecuniary compensation for each of the four distinct forms of violation of its sovereignty. This claim is presented without prejudice to the claims contained in the present Memorial relating to loss of life, personal injuries, destruction of and damage to property and other losses caused to the economy of Nicaragua, resulting from the violations of customary international law and from breaches of the obligations under the Treaty of Friendship, Commerce and Navigation signed on 21 January 1956. The claim respecting violation of Nicaragua's sovereignty is equally without prejudice to the general claim for compensation concerning moral damage, which claim is accessory to the claims for material damage (see Chap. 8 below).

391. In the submission of the Government of Nicaragua the quantum of the pecuniary satisfaction should be the product of the most logical standard of justice available, that is to say, the actual or approximate expenditure by the United States entailed by the actual operations which in each of the four cases of violation respectively contribute to the violation, or pattern of violations, of Nicaraguan sovereignty. This standard has the several attractions that it involves a neat measure of violation of sovereignty, that it is just that the quantum of wrongdoing be related to the effort expended by the wrongdoer conveniently expressed in money terms, and that the type of operation is not necessarily the same in each case and any actual difference will be reflected in the relevant expenditure.

392. This standard of justice can be applied to the four forms of violation of sovereignty as follows. In the case of the violations resulting from breaches of the principle of non-intervention the expenditure entailed by the actual operations which constituted the breaches depended upon the appropriations made in accordance with the plans and policies of the United States Government. In the material period these appropriations total $222.7[1] million (see Ann. VIII, p. 3,

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[1] This figure does not include an additional US$36.7 million raised from private sources and other countries with United States National Security Council intermediation or the funds included in this amount, product of arms sales to Iran. (See Ann. VIII, p. 3, and Ann. X, pp. 45-46.)

and Ann. X, pp. 45-46) and therefore this sum is the product of the most logical standard of justice in respect of this type of violation of sovereignty.

393. The second category of violations of sovereignty consists of the seven episodes involving direct action of United States personnel: see the Judgment on the Merits, *I.C.J. Reports 1986*, pages 48-51, paragraphs 81-86. The seven episodes in respect of which the United States has been held liable are as follows:

> "(i) 13 September 1983: an underwater oil pipeline and part of the oil terminal at Puerto Sandino were blown up;
> (ii) 10 October 1983: an attack was made by air and sea on the port of Corinto, involving the destruction of five oil storage tanks, the loss of millions of gallons of fuel, and the evacuation of large numbers of the local population;
> (iii) 14 October 1983: the underwater oil pipeline at Puerto Sandino was again blown up;
> (iv) 4-5 January 1984: an attack was made by speedboats and helicopters using rockets against the Potosi Naval Base;
> (v) 7 March 1984: an attack was made on the oil and storage facility at San Juan del Sur by speedboats and helicopters;
> (vi) 28-30 March 1984: clashes occurred at Puerto Sandino between speedboats, in the course of minelaying operations, and Nicaraguan patrol boats; intervention by a helicopter in support of the speedboats;
> (vii) 9 April 1984: a helicopter launched from a mother ship in international waters provided fire support for an ARDE attack on San Juan del Norte."

394. The Judgment on the Merits contains the following description of the *modus operandi* according to which these specific attacks were conducted:

> "The general pattern followed by these attacks appears to the Court, on the basis of that evidence and of press reports quoting United States administration sources, to have been as follows. A 'mother ship' was supplied (apparently leased) by the CIA; whether it was of United States registry does not appear. Speedboats, guns and ammunition were supplied by the United States administration, and the actual attacks were carried out by 'UCLAs'. Helicopters piloted by Nicaraguans and others piloted by United States nationals were also involved on some occasions. According to one report the pilots were United States civilians under contract to the CIA. Although it is not proved that any United States military personnel took a direct part in the operations, agents of the United States participated in the planning, direction, support and execution of the operations. The execution was the task rather of the 'UCLAs', while United States nationals participated in the planning, direction and support. The imputability to the United States of these attacks appears therefore to the Court to be established." (*I.C.J. Reports 1986*, pp. 50-51, para. 86.)

395. As the Court will understand, it is not possible to produce evidence of the actual cost of these operations, but a reasonable estimate based upon this description of the *modus operandi* would be US$10 million. This figure represents the following assumptions:

(*a*) The cost of seven individual operations at US$250,000 each.
(*b*) The cost of the logistical background and lead time operations which would be the necessary incidents of these attacks, which cost is estimated at US$8.25 million.

396. The third category of violations of sovereignty was the laying of mines over a period of months: see the Judgment on the Merits, *I.C.J. Reports 1986*, pages 46-48, paragraphs 76-80. The process of estimation in this instance must be a matter of impression and a reasonable figure would be US$5 million.

397. The fourth and last category of violations of sovereignty is by no means the least significant. The type of activity which the infringement of airspace involves in the present case goes far beyond a technical infringement of sovereignty. The purposes of the flights (Judgment on the Merits, *I.C.J. Reports 1986*, pp. 51-53, paras. 87-91) were partly for logistical support[1], partly for reconnaissance[2] and partly for intimidation, for example, by means of sonic booms. Such operations thus form an integral part of the orchestra consisting of different instruments of coercion and aggression and their attendant paraphernalia. A pattern of such operations constitutes a gross violation of the sovereignty of Nicaragua.

398. In the nature of things the costs of aerial reconnaissance of the sophisticated type employed against Nicaragua are very considerable. Nicaragua estimates that at least 10 per cent of the total cost of United States military and paramilitary activities consists of intelligence information gathered through aerial reconnaissance of Nicaraguan territory. That thus amounts to an average of US$138.5 million per year for a total of US$831 million in the period 1982-1987.

399. In conclusion, the Government of Nicaragua wishes to emphasize the circumstances which point to the particular propriety of pecuniary reparation for the violations of sovereignty perpetrated by the United States and its agents. These violations have formed a set of persistent courses or patterns of conduct: they do not represent merely technical violations of the sovereignty of Nicaragua. Moreover, the United States has on numerous occasions expressed its intention to intervene in the affairs of Nicaragua for various purposes of national policy, none of which has been recognized by the Court as a justification for the conduct concerned. Pecuniary satisfaction would reflect the significant legal interest which Nicaragua has in freedom from intervention, freedom from armed attacks, freedom from aerial trespass and freedom from the mining of her harbours and sea lanes, all of which represent legal interests of the type insisted upon by the Governments of Australia and New Zealand in their pleadings in the *Nuclear Tests* cases.

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[1] The United States Congressional Committees investigating the Iran-Contra Affair (H. Rep. No. 100-433 and S. Rep. No. 100-216) report 110 logistical overflights in the period 23 March-6 October 1986 alone. (See Ann. X, Attachment A, pp. 79-81.)

[2] Nicaragua has documented 1,796 reconnaissance flights in the period 1981-1988 (see Ann. VIII, p. 18).

CHAPTER 8

MORAL DAMAGE : THE GENERAL CLAIM FOR ACCESSORY COMPENSATION

A. Introduction

400. In the previous chapter of the Memorial the Government of Nicaragua presented its claims in respect of violations of sovereignty in terms of a request for pecuniary satisfaction as the principal form of reparation for those violations of obligations arising from customary international law. However, in the circumstances of the present case, and given the nature of the wrongful acts for which the United States has been held liable, the Government of Nicaragua requests the Court to assess an appropriate sum as additional amends, that is to say, as compensation accessory to the compensation for loss of life, personal injuries, material damage and loss to the economy of Nicaragua, resulting from the activities of the United States and its agents.

B. Accessory Compensation for Moral Damage : the Principle

401. The principle that compensation may be awarded as a form of reparation for moral damage is recognized by authoritative opinion: see Rousseau, *Droit international public*, V, Paris, 1983, pages 226-227, paragraph 225; Verzijl, *International Law in Historical Perspective*, VI, Leiden, 1973, pages 761-762; and Reitzer, *La réparation comme conséquence de l'acte illicite en droit international*, Paris, 1938, pages 210-212.

402. The principle has also been recognized in several major episodes of dispute settlement. Thus in the *I'm Alone* case the Canadian Government complained of the sinking on the high seas of a liquor-smuggling vessel of Canadian registration by a United States coastguard vessel, as a climax to a hot pursuit which commenced outside United States territorial waters but within the inspection zone provided for in the "Liquor Treaty" between Great Britain and the United States. The Canadian claim was referred to Commissioners appointed under the Convention concerned, and in their final report the following appears:

> "We find as a fact that, from September, 1928, down to the date when she was sunk, the *I'm Alone*, although a British ship of Canadian registry, was *de facto* owned, controlled, and at the critical times, managed, and her movements directed and her cargo dealt with and disposed of, by a group of persons acting in concert who were entirely, or nearly so, citizens of the United States, and who employed her for the purposes mentioned ... The Commissioners consider that, in view of the facts, no compensation ought to be paid in respect of the loss of the ship or the cargo.
>
> The act of sinking the ship, however, by officers of the United States Coast Guard, was, as we have already indicated, an unlawful act; and the Commissioners consider that the United States ought formally to acknowledge the illegality, and to apologize to His Majesty's Canadian Government therefor; and, further, that as a material amend in respect of the wrong the

United States should pay the sum of $25,000 to His Majesty's Canadian Government; and they recommend accordingly." (*Reports of International Arbitral Awards*, III, p. 1609 at pp. 1617-1618.)

C. Acceptance of the Principle of Compensation for Moral Damage by the United States Government

403. It comes as no surprise that the element of compensation for "moral damage" is recognized in the practice of States, and, in particular, in the two United States Department of State compilations of practice: see Hackworth, *Digest of International Law*, II, U.S.G.P.O., Washington, 1941 (Department of State Publication 1521), pages 703-708, and Whiteman, *Digest of International Law*, Volume 8, U.S.G.P.O. (released December 1967) (Department of State Publication 8290), pages 1212-1214, which incorporate the decision of the Commissioners in the *I'm Alone* case. In addition it is to be recalled that Whiteman, *Damages in International Law*, Volume II, U.S.G.P.O., Washington, 1937, pages 1372-1376, incorporates the text of the report of the Commission appointed by the Council of the League of Nations to carry out an investigation of the Greek-Bulgarian frontier incident of 1925. The Report, dated 28 November 1925, makes recommendations regarding reparation to be made, *inter alia*, for "moral damage".

404. Again in the *Aerial Incident* case the United States claim against Bulgaria, as carefully formulated in its Memorial (pp. 246-248), included a claim for the illegality and wanton breach of international standards. The Memorial relies, *inter alia*, upon the Final Report of the Commissioners in the *I'm Alone* case. The key passages in the United States Memorial are as follows (at p. 246):

> "2. On the subject of additional amends, of which the United States gave notice in its Application, paragraph 3, the United States Government respectfully submits that the Court should grant an additional judgment to the United States Government for $100,000 for the additional wrongs wantonly committed by the Bulgarian Government, that is, other than those committed against the next of kin whose monetary claims for compensatory damages have been espoused by the United States. For if we were to follow only the compensatory theory of civil damages in general, we might conceivably reach a point where no damages would be payable though treacherous murders were committed internationally by one government on the nationals of another government. Additional amends to the injured government are therefore desirable and even necessary.
>
> International law authorities have recognized the existence of this problem (see, for example, the reservation to judgment of Judge Parker in the *Lusitania* case which is cited by the Memorial of the Government of Israel in the parallel case, paragraph 104, page 108, last sentence).
>
> On the issue of damages the applicable case is, therefore, the *I'm Alone* case, which is discussed in Volume I, Whiteman's *Damages in International Law* (1937), pages 151-157, 717. In that case the commission, consisting of Mr. Justice Van Devanter of the United States Supreme Court and Duff, Canadian Commissioner, ruled that the United States should pay, in addition to individual sums for the sinking of a rum-runner of Canadian registry as compensation to the members of the crew who were not parties to the illegal conspiracy to smuggle liquor into the United States, a sum of $25,000 to

> the Canadian Government in addition to apologizing to that Government for the intentional sinking of the suspected vessel. The commission said that:
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> > "... the sinking could not be justified by any principle of international law ... The act of sinking the ship ... by officers of the United States Coast Guard, was ... an unlawful act";
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> and the commissioners considered that the United States ought:
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> > "... formally to acknowledge its illegality and to apologize to His Majesty's Canadian Government therefor; and, further, that as a material amend in respect of the wrong the United States should pay the sum of $25,000 to His Majesty's Canadian Government; and they recommend accordingly." (Whiteman, page 187.)
>
> It is noted that in the *Imbrie* case against Persia, the United States took a similar view (see Whiteman, Volume I, page 732).
>
> Courts have long recognized that there are situations in which no showing of monetary loss need be made to justify a monetary award. The relevance of the domestic Anglo-American law on defamation is an example. As is well known, injury to reputation does not need to be proved to the penny and juries and courts are permitted to award substantial damages without a showing of actual injury. The damage inflicted on the United States and the American people is obviously greater than the damage to an individual.
>
> The case presented in this Memorial is not simply a civil problem of claims of American nationals. The whole problem of the freedom of the air and the safety of the nationals of all governments from murderous attack by the government of overflown terrain is involved. The problem presented transcends the individual 4X-AKC.
>
> The principle that a government is liable for its torts, both for those committed against the nationals of other governments and those against other governments themselves, is clear ..." (*I.C.J. Pleadings, Aerial Incident*, pp. 246-247.)

405. In the *Aerial Incident* case the United States Memorial concluded with a special claim of $200,000 to cover the delictual elements, in addition to the awards of "monetary damage, for the account of the next of kin of the American passengers". (*Ibid.*, p. 248.)

406. These materials demonstrate beyond any reasonable doubt that the United States Government has accepted the principle that compensation is an appropriate form of reparation in cases of so-called "moral damage" to the claimant State. Moreover, the principle is recognized as being applicable precisely in the situation in which the moral damage forms an aspect of conduct involving material harm and consequently the compensation for moral damage is in a sense accessory to the claim for deaths, personal injuries and material losses.

D. The Connection between the Findings on the Merits, Obligations *Erga Omnes*, and Norms of *Jus Cogens*

407. The propriety of reparation for moral damage in the present proceedings is confirmed by the particular character of the legal norms involved in the principal findings of the Court on the Merits. The findings in subparagraphs 3 and 4 of the Dispositif of the Judgment on the Merits relate directly to obligations *erga omnes*. This type of obligation was profiled in a passage in the Judgment of the Court in the *Barcelona Traction* case thus:

"33. When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi-universal character." (*I.C.J. Reports 1970*, p. 32.)

The Court is respectfully reminded that the majority Judgment in the *Barcelona Traction* case had the support of 12 Judges.

408. The concept of obligations valid *erga omnes* has broad support from authoritative opinion: see, for example, Mosler, *The International Society as a Legal Community*, Alphen aan den Rijn, 1980, pages 19-20, 134-136. The concept is for most practical purposes identical to that of *jus cogens*, a concept which has received widespread recognition from authoritative opinion. The evidence of such general acceptance is by no means confined to the well-known provisions in Articles 53, 64 and 71 of the Vienna Convention on the Law of Treaties concluded in 1969. As long ago as 1957 Sir Gerald Fitzmaurice, in his lectures at the Hague Academy, referred to:

> ". . . certain forms of illegal action that can never be justified by or put beyond the range of legitimate complaint by the prior illegal action of another State, even when intended as a reply to such action. These are acts which are not merely illegal, but *malum in se*, such as certain violations of human rights, certain breaches of the laws of war, and other rules in the nature of *jus cogens* — that is to say obligations of an absolute character, compliance with which is not dependent on corresponding compliance by others, but is requisite in all circumstances, unless under stress of literal *vis major*." (92 *Recueil des cours* (1957-II), p. 120; and see also at pp. 122, 125.)

409. The extensive acceptance given to the concept of *jus cogens* by the most highly qualified publicists of the various nations is amply evidenced by the following sources: Fitzmaurice, *British Year Book of International Law*, Volume 35 (1959), pages 224-225 (also published in Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Cambridge, 1986, pp. 626-627); McNair, *The Law of Treaties*, Oxford, 1961, pages 213-215; Waldock (Special Rapporteur of the International Law Commission), Second Report on the Law of Treaties, *Yearbook of the International Law Commission*, 1963, II, pages 52-53, paragraphs 1-6; Quadri, 113 *Recueil des cours* (1964-III), pages 335-338; Jennings, *Cambridge Essays in International Law*, London, 1965, pages 73-74; Verdross, *American Journal of International Law*, Volume 60 (1966), pages 55-63; Morelli, *Rivista di diritto internazionale*, Volume 51 (1968), pages 108-117; Judge

Ammoun, separate opinion in the *Barcelona Traction* case, *I.C.J. Reports 1970*, page 304; Ago, 134 *Recueil des cours* (1971-III), page 324 (note 37); Tunkin, *Theory of International Law*, London, 1974, pages 147-160; Ago (Special Rapporteur of the International Law Commission), *Yearbook of the International Law Commission*, 1976, II (Part One), pages 31-32, paragraphs 98-99; Jiménez de Aréchaga, 159 *Recueil des cours*, Volume 159 (1978-I), pages 62-68; Podesta Costa and Ruda, *Derecho Internacional Publico*, 5th edition, 1979, I, page 30; Nguyen Quoc Dinh, Daillier and Pellet, *Droit international public*, Paris, 1987, pages 107, 185-191; and the Counter-Memorial submitted by the United States in the Jurisdiction phase of the present case, dated 17 August 1984, **II**, pages 94-95, paragraph 314.

410. In brief, the concept of *erga omnes* obligations and its close relation *jus cogens* stand for the *ordre public* of the international community, and the award of reparation for moral damage would give substance to this *ordre public* and thus fall well within the bounds of the judicial function and considerations of judicial propriety.

411. For there can be no doubt, in the submission of the Government of Nicaragua, that the preponderance of the activities for which the United States has been held to bear responsibility fall within the category of norms of *jus cogens*. The subject-matter of *jus cogens* was summarized by Judge Ago in his lectures at the Hague Academy in 1971 thus:

> "If one examines carefully the opinions expressed in the International Law Commission and, more generally, in the writings of jurists, one becomes aware that a certain unity of views exists with regard to the determination of the rules which the consciousness of the world regards today as rules of *jus cogens*. These include the fundamental rules concerning the safeguarding of peace, in particular those which prohibit any recourse to the use or threat of force, fundamental rules of a humanitarian nature (prohibition of genocide, slavery and racial discrimination, protection of essential rights of the human person in time of peace and of war), the rules prohibiting any infringement of the independence and sovereign equality of States, the rules which ensure to all the members of the international community the enjoyment of certain common resources (the high seas, outer space, etc.)." (134 *Recueil des cours* (1971-III), p. 324, note 37; reproduced in English translation, *Yearbook of the International Law Commission*, 1976, II (Part One), p. 32, note 148.)

412. The law of the Charter of the United Nations concerning the use of force is always recognized as forming part of *jus cogens*: see President Waldock, *Yearbook of the International Law Commission*, 1963, II, page 52, paragraph 1; President Jiménez de Aréchaga, 159 *Recueil des cours* (1978-I), page 64. Moreover, Judge Ago's formulation (quoted in the previous paragraph) includes not only the "fundamental rules" relating to the use or threat of force but also "the rules prohibiting any infringement of the independence and sovereign equality of States", and this expression may be reasonably understood to extend to violations of the obligation under customary international law not to intervene in the affairs of another State, whether or not such violations involve the use or threat of force.

413. In any case, in a context which prefigured the appearance of *jus cogens* as such, the Court has characterized resort to forcible intervention in the following terms:

> "The Court can only regard the alleged right of intervention as the

manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law." (*Corfu Channel* (Merits), *I.C.J. Reports 1949*, p. 35.)

E. The Particular Elements of Affront to International Public Order

414. The elements of moral damage will naturally vary considerably from case to case according to the circumstances and the identification of the elements relevant to a particular case must be a matter of appreciation. However, the process of weighing up the elements of moral damage is by no means unstructured, and must reflect the relevant precedents and known criteria of contemporary international public policy.

(i) *The Connection between the Activities of the United States and Norms of* Jus Cogens

415. The Government of Nicaragua has already emphasized that the preponderance of the activities for which the United States has been held to bear responsibility fall within the category of norms of *jus cogens*.

(ii) *The Overall Intention and Policy of the United States Government*

416. The particular nature of the overall intention and policy of the United States Government is of the greatest relevance for present purposes. The real nature of that policy was represented in the evidence set forth in the Memorial of Nicaragua in the Merits phase of these proceedings. As a consequence of the Iran-Contra hearings, the full nature and extent of the United States policy aims and cynical indifference to the standards of international law and morality are now matters of public knowledge (see Ann. X, Attachments A-D). The circumstances of United States armed aggression and its persistent campaign of intervention are such that there is a total absence of any data which might be relevant to either justification or mitigation. In short, the policies and the modes of implementation adopted were not only illegal *sub modo* but were also illegal *ab initio* and *ipso facto*.

(iii) *The Seriousness of the Breaches*

417. On a previous occasion the Court found it necessary to emphasize "the extent and seriousness of the conflict between the conduct of [the Respondent State] and its obligations . . ." (see the Judgment in the case concerning *United States Diplomatic Consular Staff in Tehran*, *I.C.J. Reports 1980*, page 42, paragraph 91. In the same context the Court found itself "obliged to stress the 'cumulative effect' of the Respondent State's breaches when taken together" (*ibid.*). These characterizations apply with no less justice to the conduct of the United States as described in the body of the Judgment on the Merits and as reflected in the impressive succession of findings in the Dispositif.

(iv) *Cynical Disregard of the Obligations of the Treaty of Friendship, Commerce and Navigation of 1956*

418. In subparagraphs 10 and 11 of the Dispositif of the Judgment on the

Merits the Court deals in its findings with specific conduct of the United States involving breaches of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956, and calculated to deprive that instrument of its object and purpose. The issues of reparation arising from the general embargo on trade and other specific acts of the Respondent State have been examined elsewhere in the Memorial (see Chaps. 3 and 5). However, in the opinion of the Government of Nicaragua, the deliberate and totally unjustified breaches of a treaty of friendship provide an independent basis for a claim for pecuniary satisfaction by way of reparation for a form of moral damage.

419. The calculated disregard of the provisions of a Treaty of Friendship, Commerce and Navigation, involving the laying of mines in the approaches to Nicaraguan ports is *par excellence* a type of moral damage. As the Court indicates in its Judgment on the Merits (*I.C.J. Reports 1986*, p. 138, paras. 275-276) the breaches of the Treaty involved direct attacks on ports and other targets, the mining of Nicaraguan ports and acts of economic presure. The view of the Court is clearly expressed: the conduct of the Respondent State was in this respect "flagrantly in contradiction with the purpose of the Treaty" (*ibid.*, para. 276).

(v) *Intimidation as an Instrument of National Policy*

420. The most striking feature of this case is the persistent policy of the Government of the United States to coerce the Government of Nicaragua into an acceptance of its political demands. The present proceedings are focused primarily upon intervention and the use of force as instruments of national policy. In its Judgment on the merits the Court has taken care to emphasize that no "general right of intervention, in support of an opposition within another State, exists in contemporary international law": see *I.C.J. Reports 1986*, pages 108-109, paragraphs 206-209; and, in particular, page 109, paragraph 209. Moreover, the Court has pointed out that the United States has not claimed that its intervention is justified on the legal plane: see *ibid.*, paragraphs 207-208.

421. Thus the policy aim of the United States (the coercion of the Government of Nicaragua as an instrument of national policy), the attitude of the Government of the United States (a cynical indifference to the absence of a legal justification), and its actual conduct (the extensive and persistent use of coercion both by means of armed force and by means of economic pressure), involve breaches of the rules prohibiting the "infringement of the independence and sovereign equality of States", which rules have been described by Judge Ago as rules of *jus cogens*: see 134 *Recueil des cours* (1971-III), page 324, note 37; and (in English translation) *Yearbook of the International Law Commission*, 1976, II (Part One), page 32, note 148.

(vi) *The Callous Indifference to Elementary Considerations of Humanity*

422. In a number of respects the activities of the United States reflected, and continue to reflect, a callous indifference to the "elementary considerations of humanity" referred to by the Court in its Judgment in the *Corfu Channel* case (Merits), *I.C.J. Reports 1949*, page 22. It has been the standard tactic of the *contra* forces to kill civilians and to use deliberate tactics of terror. Consequently the quality of the intervention for which the United States has been held responsible is the moral equivalent to the conduct described by the United States Memorial in the *Aerial Incident* case, as follows:

> "The case is one which, if committed by individuals, would submit them to charges of murder and in many countries to capital punishment and certainly to maximum penalties." (*I.C.J. Pleadings, Aerial Incident* case, p. 246.)

423. This callousness in choice of methods by responsible officials of the United States is highlighted by the production and dissemination of the manual entitled *Operaciones sicologicas en guerra de guerrillas* in 1983. The Judgment on the Merits (pp. 65-69, paras. 116-122) provides a succinct description of the contents and purposes of this remarkable work. As the Court has occasion to observe:

> "the question whether the United States was, or must have been, aware at the relevant time that allegations of breaches of humanitarian law were being made against the *contras* is relevant to an assessment of the lawfulness of the action of the United States" (*ibid.*, para. 116).

In a later section of the Judgment the Court examined the legal implications of the publication and dissemination of the manual and reached the following conclusions:

> "255. The Court has also found (paragraphs 219 and 220 above) that general principles of humanitarian law include a particular prohibition, accepted by States, and extending to activities which occur in the context of armed conflicts, whether international in character or not. By virtue of such general principles, the United States is bound to refrain from encouragement of persons or groups engaged in the conflict in Nicaragua to commit violations of Article 3 which is common to all four Geneva Conventions of 12 August 1949. The question here does not of course relate to the definition of the circumstances in which one State may be regarded as responsible for acts carried out by another State, which probably do not include the possibility of incitement. The Court takes note of the advice given in the manual on psychological operations to 'neutralize' certain 'carefully selected and planned targets', including judges, police officers, State Security officials, etc., after the local population have been gathered in order to 'take part in the act and formulate accusations against the oppressor'. In the view of the Court, this must be regarded as contrary to the prohibition in Article 3 of the Geneva Conventions, with respect to non-combatants of
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> > 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people'
>
> and probably also of the prohibition of 'violence to life and person, in particular murder to all kinds . . .'.
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> 256. It is also appropriate to recall the circumstances in which the manual of psychological operations was issued. When considering whether the publication of such a manual encouraging the commission of acts contrary to general principles of humanitarian law, is unlawful, it is material to consider whether that encouragement was offered to persons in circumstances where the commission of such acts was likely or foreseeable. The Court has however found (paragraph 121) that at the relevant time those responsible for the issue of the manual were aware of, at the least, allegations that the behaviour of the *contras* in the field was not consistent with humanitarian law ; it was in fact even claimed by the CIA that the purpose of the manual

> was to 'moderate' such behaviour. The publication and dissemination of a manual in fact containing the advice quoted above must therefore be regarded as an encouragement, which was likely to be effective, to commit acts contrary to general principles of international humanitarian law reflected in treaties." (*I.C.J. Reports 1986*, pp. 129-130, paras. 255-256.)

424. Moreover, the issues thrown up by the encouragement of brutal conduct toward the population of Nicaragua were reflected in subparagraph 9 of the Dispositif, adopted by 14 votes to 1, thus:

> "*Finds* that the United States of America, by producing in 1983 a manual entitled *Operaciones sicologicas en guerra de guerrillas*, and disseminating it to *contra* forces, has encouraged the commission by them of acts contrary to general principles of humanitarian law; but does not find a basis for concluding that any such acts which may have been committed are imputable to the United States of America as acts of the United States of America." (*ibid.*, p. 248).

In the submission of Nicaragua the significance which the Court has so obviously attached to this facet of the conduct of the United States should be reflected appropriately in the award of reparation for what is evidently a classical instance of moral damage.

(vii) *Hardship Caused to the People of Nicaragua*

425. Apart from the actual atrocities committed against the population by the *contra* forces and the physical consequences of the armed attacks launched against centres of population, the covert war and the economic pressure exerted against Nicaragua have caused hardship to the people of Nicaragua. Large numbers of people have had to flee the war zones and cultivated areas have been abandoned. It may be recalled that the Court stressed the element of hardship to human beings (in respect of a relatively small group) in its Judgment in the case concerning *United States Diplomatic and Consular Staff in Tehran* (*I.C.J. Reports 1980*, p. 42, para. 91.)

426. The general impact of the United States "intervention" and the damage resulting cannot be measured exclusively in terms of deaths, injuries, material damage and other losses to the economy. There are additional social effects arising from the diversion of resources to purposes of national security and a progressive deterioration of the infrastructure. The particular results of this weakening of the means of providing health services and education, in a country in which the general standard of living is very low, are reflected in the statistics relating to infant mortality and illiteracy (see data in Ann. I.2).

(viii) *The Court's Order of 10 May 1984 as a Circumstance Relevant to Moral Damage*

427. The particular scale and significance of the threat to the sovereignty and political independence of Nicaragua were fully recognized in the operative part of the indication of provisional measures contained in the Order made by the Court on 10 May 1984. The second paragraph, adopted by 14 votes to 1, provided as follows:

> "The right to sovereignty and to political independence possessed by the Republic of Nicaragua, like any other State of the region or of the world, should be fully respected and should not in any way be jeopardized by any

> military and paramilitary activities which are prohibited by the principles of international law, in particular the principle that States should refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any State, and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of a State, principles embodied in the United Nations Charter and the Charter of the Organisation of American States." (*I.C.J. Reports 1984*, p. 187.)

428. The Government of Nicaragua would respectfully remind the Court that in its Judgment on the Merits it was felt necessary "that it should re-emphasize, in the light of its present findings" the indication set forth above. In the submission of the Government of Nicaragua this indication, addressed as it was solely to the Respondent State, constitutes a circumstance relevant to the determination of reparation for moral damage.

(ix) *The Disregard of the Court's Injunctive Declaration as a Circumstance Relevant to Moral Damage*

429. The Court responded to the request contained in the Memorial of Nicaragua by a decision by way of an injunctive declaration to the effect that "the United States of America is under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations" (Dispositif, subpara. 12). This is obviously the linchpin of the structure of findings.

430. It is a matter of public record that the United States has chosen to disregard this decision of the Court and the Government of Nicaragua desires to indicate its opinion that such blatant disregard of a decision of the Court, the principal judicial organ of the United Nations, constitutes an important circumstance relevant to the determination of reparation for moral damage in these proceedings. As the Court has observed in relation to the provisional measures indicated on 10 May 1984:

> "Furthermore, the Court would draw attention to the further measures indicated in its Order, namely that the Parties 'should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court' and
>
> > 'should each of them ensure that no action is taken which might prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case'.
>
> When the Court finds that the situation requires that measures of this kind should be taken, it is incumbent on each Party to take the Court's indications seriously into account, and not to direct its conduct solely by reference to what it believes to be its rights. Particularly is this so in a situation of armed conflict where no reparation can efface the results of conduct which the Court may rule to have been contrary to international law." (*I.C.J. Reports 1986*, p. 144, para. 289.)

(x) *The Infringement of the Freedom of Communications and of Maritime Commerce*

431. In its Judgment on the Merits (*I.C.J. Reports 1986*, paras. 214, 253) the Court gives due significance to the principle of freedom of maritime communi-

cations recognized by the Court in the *Corfu Channel* case (Merits), *I.C.J. Reports 1949*, page 4 at page 22. In particular, the Judgment on the Merits in the present proceedings points out that:

> "... it is clear that interference with a right of access to the ports of Nicaragua is likely to have an adverse effect on Nicaragua's economy and its trading relations with any State whose vessels enjoy the right of access to its ports. Accordingly, the Court finds, in the context of the present proceedings between Nicaragua and the United States, that the laying of mines in or near Nicaraguan ports constituted an infringement, to Nicaragua's detriment, of the freedom of communications and of maritime commerce." (*I.C.J. Reports 1986*, p. 129, para. 253.)

432. In the submission of the Government of Nicaragua this detriment pointed to should be given substance in that it be recognized as a significant element in the justification of an award of compensation for moral damage.

F. Compensation for Moral Damage: the Claim

433. In the submission of the Government of Nicaragua a claim in respect of moral damage to the Republic of Nicaragua is justified on the following bases, either taken as independently sufficient or as collectively sufficient.

First: by reason of the general principles of public international law.

Second: as a consequence of the specific recognition and approval of the principle of compensation for moral damage by the United States Government in the proceedings in the *Aerial Incident* case and otherwise.

Third: by reason of the particular elements of affront to international public order present in these proceedings and which are relevant to the determination of the propriety and quantum of reparation for moral damage.

434. In accordance with subparagraph 13 of the Dispositif of the Judgment on the Merits the Government of Nicaragua claims the sum of US$2,443,200,000 as the just and equitable reparation for the moral damage resulting from the illegal activities of the United States (apart from the claims relating to the violations of Nicaragua's sovereignty).

CHAPTER 9

THE PERIOD FOR WHICH REPARATION MUST BE CALCULATED

435. The function of this Chapter is to analyse the temporal dimension of the United States obligation to make reparation for the damage and injuries done to Nicaragua through its internationally wrongful acts. This requires a determination of the duration of the internationally unlawful acts committed by the United States, more particularly the date on which they began and the date, if any, on which they ended. As the International Law Commission stated in its 1978 Report to the General Assembly, these determinations

> "may be decisive in resolving a whole series of problems in which temporal element is involved. That is the case, for example, with regard to the determination of the extent of the injury caused by a given internationally wrongful act and, consequently, of the amount of reparation owed by the State that has committed the act in question." (*Yearbook of the International Law Commission*, 1978, II (Part Two), p. 87.)

436. Nicaragua submits that by virtue of subparagraphs 3, 4 and 13 of the Dispositif, the United States is under an obligation to make reparation to Nicaragua under subparagraphs (3) and (4) of the Dispositif in an amount measured by the damage inflicted by the military and paramilitary activities between December 1, 1981, at the latest and the present, and for as long into the future as it continues to act in the manner found by the Court to be unlawful.

(i) The Date from Which Reparation Should Be Calculated

437. The Court determined that the internationally unlawful conduct of the United States consisted in "training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua ..." (Dispositif, subpara. (3), and, to the extent that these acts "involve the use of force", *ibid.*, subpara. (4), *I.C.J. Reports 1986*, pp. 146-147.) The breach may be considered to be a "breach of an international obligation by a complex act" within the meaning of the International Law Commission draft articles on State Responsibility, Article 25 (3). See *Yearbook of the International Law Commission*, 1978, II (Part Two), page 80. The unlawful activity was also a wrong having a "continuing character" within the meaning of Article 25 (*ibid.*). It consists of "a succession of actions or omissions ... in respect of the same case" (*ibid.*), although it is not excluded that some acts in the series might independently be violative of international law. In the present case, the "succession of actions" begins with the official presidential finding authorizing the provision of covert assistance to the *contras*, and includes the various appropriations of funds by the Congress, the expenditure of funds for the purchase of arms and equipment, the delivery of these supplies, the provision of training, intelligence information and logistic support, etc. All of these were acts of organs of the United States and are fully imputable to it.

438. According to Article 25 (3), in the case of a complex act the breach does not "occur" until "the moment when the last constituent element of that complex act is accomplished" (*ibid.*). Nevertheless, the Article continues, the duration of the breach "extends over the entire period between the action or omission which initiated the breach and that which completed it" (*ibid.*).

439. In the present case, the action that initiated the complex act took place sometime in late 1981. President Reagan made the Finding required by United States law to authorize covert activities against Nicaragua in November 1981. The significance of this date is confirmed by evidence that organized *contra* activity began to increase around that time. The affidavit of Edgar Chamorro stated that the "mergers arranged by the CIA" of "the previously disparate armed bands" into a single armed opposition force took place before August 1981. (Merits, para. 94.) Further, according to the testimony of Comandante Carrion, "'organized military and paramilitary activities' began in December 1981". (Merits, para. 93.)

440. Thus, "the action or omission which initiated the breach" occurred by 1 December 1981 at the latest. It naturally follows that the United States obligation to make reparation runs from that date[1].

(ii) The Date to Which Reparation Should Be Calculated

441. In this case the international wrong did not end with the completion of the complex act. The breach is a "continuing wrong", draft article 25 (1), which endures as long as the United States persists in the activities found to be illegal[2]. Thus, the United States is under a duty to make reparation in an amount measured by the damage done by the military and paramilitary activities as long as they continue[3].

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[1] The discussion in the text characterizes the wrongful conduct adjudged by the Court as a complex act culminating in or followed by an act having a continuing character. The same conduct might equally well be characterized as a composite act. The series of actions involved in the provision of supplies, equipment, training, weapons and logistical and intelligence support, repeated over the period in issue, established an integrated pattern of wrongful United States activity. The alternative characterization would have no effect on the duration of the breach, however. According to ILC draft Article 25 (2), that "extends over the entire period from the first of the actions or omissions constituting the composite act … and so long as such actions or omissions are repeated". The first act constituting the composite act occurred by 1 December 1981, as shown above, and the pattern is being repeated to the present.

[2] The International Law Commission's Report to the General Assembly includes examples of a continuing wrong: unlawful blockade of foreign ports, unlawful occupation of the territory of a foreign State, unlawful detention of a foreign official. *Yearbook of the International Law Commission*, 1978, II (Part Two), page 90. The breach in the present case can be easily analogized to these. Supplying the *contras* with arms, training, equipment, financing, logistical support, etc., constituted a breach of international law, in the same way that the creation of an illegal naval blockade would constitute a breach. The continuous or repeated supplying of arms, etc. — as happens in the present case — establishes that the breach is a continuing violation, just as the maintaining of a blockade is a continuing violation.

[3] The Court was unable to find "that the respondent State 'created' the *contra* force in Nicaragua", *I.C.J. Reports 1986*, paragraph 108, page 61, because "there is some evidence to show that some armed opposition to the Government of Nicaragua existed in 1979-1980, even before any interference or support by the United States". (*Id.*, para. 93, at 53.) Thus, strictly speaking, the United States should not be held responsible for that portion of the damage that could have been accomplished by these forces without any outside assistance. The Court also found, however, that these bands operated "in a disorganized way and with limited and ineffectual resources . . .". (*Id.*, para. 108, at 62.) We are therefore entitled to conclude that the damages that would have been done absent United States aid are *de minimis*. This conclusion is borne out by the evidence, which shows that the material damage from *contra* activities in 1980 amounted to three killed and wounded and only $1.5 million in property damage. For 1981, when assistance was given for the last month or two of the year, the figures come to 70 killed and wounded and $7.4 million in property damage. (Ann. I.2, pp. 9, 17.) There is no record of *contra* casualties in 1980. For 1981, there were 42 killed and wounded and 20 captured. (*Id.*, p. 23.)

442. In its Judgment on the Merits, the Court identified 30 September 1984 as the cut-off date for United States "finance for supporting the military and paramilitary activities of the *contras*". (Merits, para. 97.) This conclusion was based on two factors. First, the record before it contained evidence showing, erroneously as it turns out, that United States assistance was "limited to 'humanitarian assistance'" after that date. (*Ibid.*) (The Court itself implied that this assistance would not qualify as "humanitarian" under the principles of international law. *Ibid.*, paras. 242, 243.) Secondly, the Court perforce rendered its Judgment on the basis of the evidence of record as it stood on 20 September 1985, at the close of the oral hearings on the merits, which could include no information about United States activities thereafter. (Para. 58.)

443. In the present phase, Nicaragua has introduced evidence to show that despite the understanding expressed by the Court in the Judgment, United States activities in all the forms mentioned in the Dispositif — and with it the responsibility of the United States to make reparation — continues down to the present. This evidence is presented in Annex X and the attachments thereto. In brief, the evidence establishes the following.

444. First, despite the legislative prohibition on military aid, in the period before the close of the oral hearings from 1 October 1984 to 30 September 1985, and thereafter until 18 October 1986, officials of the United States National Security Council, the Central Intelligence Agency, and other organs of the United States operated a far-flung secret network to ensure the continued provision of money, arms, transport, intelligence, training and other assistance to the *contras*. A full account of this activity is contained in the Report of November 1987 of the Iran-Contra Committees of the United States Senate and House of Representatives, which Nicaragua has submitted to the Court (hereafter, the "Iran-Contra *Report*"). Thereafter, beginning in October 1986 the United States resumed overt military assistance to the *contras*. Although in February 1988, when the current appropriation expired, the Congress refused to make any further appropriation, funds, weapons, supplies, equipment and other military assistance sufficient for several months were still in the pipeline. The United States President has announced his intention to secure additional Congressional funding. (Ann. X, p. 44.)

445. In sum, the evidence shows that United States military and paramilitary activities, condemned in the Judgment on the Merits, have continued without interruption until the present.

(a) *Evidence of Events Occurring before the Close of the Oral Hearings in September 1985*

446. The proof concerning United States secret activities against Nicaragua in fiscal year 1985 is summarized in Annex X, *A Chronological Statement of Evidence relating to Continued Military and Paramilitary Activities in and against Nicaragua*, pages 5-37. The Chronological Statement is based primarily on the Iran-Contra *Report*. It shows that, from 30 September 1984, when under the Boland Amendment all military and paramilitary activity in and against Nicaragua was supposed to cease, until the resumption of overt military aid in October 1986, the United States conducted a secret full-scale operation to maintain and preserve the covert war. The Iran-Contra *Report* summarizes the two years of activity as follows:

> "... North had successfully managed, with the approval of his superiors, the covert program to assist the *Contras* for almost two years ...
> ... The result was that, with the help of other United States Government

> officials, North managed to provide the *Contras* what Congress had not: a full-scale program of military assistance." (Iran-Contra *Report*, p. 78.)

447. Lt. Col. Oliver L. North, a member of the National Security Council staff with offices in the White House, was the principal operating officer in charge of the program. He acted under the authority and with the approval of his superiors, Robert McFarlane and John Poindexter, who successively held the office of National Security Adviser to the President. He had the authorization and co-operation of the Director of Central Intelligence, William J. Casey. Numerous other officials were heavily involved in the operation, including the Assistant Secretary of State for Inter-American Affairs, the Ambassador and CIA Station Chief in Costa Rica, and United States military officers in Central America. A special "Restricted Interagency Group" with representatives from the State Department, CIA and NSC had overall direction of the operation.

448. The President himself admitted that he knew and approved of the activity:

> "Now . . . the *Contra* situation . . . There's no question about my being informed. I've known what's going on there . . . And to suggest that I am just finding out or that things are being exposed that I didn't know about — no. Yes, I was kept briefed on that. As a matter of fact, I was very definitely involved in the decisions about support to the freedom fighters. It was my idea to begin with." (Ann. X, p. 33.)

There can be no doubt that, even though they may have been acting illegally, North and his superiors were acting as officials of the United States and their acts are imputable to the United States. As stated by Judge Ago in his Third Report on State Responsibility, in determining whether an act is internationally wrongful, it is irrelevant that the State organ has acted in violation of municipal law. (*Yearbook of the International Law Commission*, 1971, II (Part One), p. 226.)

449. In the course of their activities, these officials made use of a network of former United States military and intelligence officers, arms brokers, offshore bank accounts and dummy corporations, referred to by the Congressional Committees as "the Enterprise". To quote the *Report* again,

> "The Enterprise, functioning largely at North's direction, had its own airplanes, pilots, airfield, operatives, ship, secure communications devices and secret Swiss bank accounts." (Iran-Contra *Report*, p. 4.)

450. The activities of North and the other United States officials and private individuals assisting the *contras* during this period were manifold. The first objective was to restore the flow of funds to the *contras* that Congress had cut off. To this end, they acted in the name of the United States to secure contributions from other countries and from private sources in the name and using the prestige of the President. (*Ibid.*, pp. 85, 90-91, 100.) In all, the Enterprise raised at least US$36 million in the 1984-1985 period.

451. North and his associates used the funds to continue the military and paramilitary activities in and against Nicaragua. These activities included the procurement of infantry weapons — AK-47 rifles, RPG-7 rocket launchers, light machine guns, and SA-7 surface-to-air missiles — based on lists drawn up by *contra* commander Bermudez and reviewed and revised by North. (*Ibid.*, p. 50; see also *ibid.*, p. 48.)

452. In addition, the United States provided extensive intelligence information to the *contras*.

> "The CIA and DOD [Department of Defense] could not provide military intelligence directly to the *contras*, so North provided it himself. North

> would obtain maps and other intelligence on the Sandinista positions from the CIA and DOD, ostensibly for his own use. North would then pass the intelligence on to the *contras* using Owen as a courier." (*Ibid.*, at 43.)

North also sent to the *contras* detailed directives concerning specific military operations and deployments. (See Ann. X, pp. 12-14.)

453. North summarized the results of the secret operations as of 1 May 1985 in a memorandum to McFarlane, claiming that:

> "The FDN has grown nearly two-fold since the cut-off of USG [United States Government] funding . . . In short, the FDN has well used the funds provided and has become an effective guerrilla army in less than a year." (*Ibid.*, p. 16.)

454. Beginning 1 October 1985, official United States assistance was resumed with an appropriation of $27 million limited to "humanitarian assistance". Despite this label, as the Court noted in paragraph 243 of the Judgment on the Merits, the CIA was specifically authorized to share intelligence information with the *contras*. A secret fund of as much as $13 million was established for communication facilities for this purpose. (Iran-Contra *Report*, pp. 64, 444n5.) As a result, in 1985, United States aircraft — RC-135, SR-71, AC-130, EC-130, U-2, and F-34, as well as C-130s adapted for aerial photography — made a total of 880 reconnaissance flights over Nicaraguan territory in the period 1 October 1984 to 30 September 1985. (Ann. VIII, 13-14.)

455. Operations continued unabated in this period. One focus of the effort was the opening of a "southern front" for the *contra* war, based in Costa Rica. Lewis A. Tambs, newly appointed United States ambassador to Costa Rica, considered this his major assignment. A second major focus was improvement of the system for delivery of supplies to the *contras* on both the northern and southern fronts. To this end, an elaborate air-supply network was established, operating out of the United States built military air base at Ilopango, El Salvador. A second air field for supply and refuelling was established in Costa Rica. (See Ann. X, pp. 19-27.) Thus, for example:

> "Between early April and April 11 [1986], North coordinated virtually every aspect of the first drop of lethal supplies into Nicaragua by way of the Southern front. He was in regular communication with Secord and others to ensure that the drop was successful. KL-43 messages among the planners involved in this drop show both the level of detail in which North was concerned and the coordination among various United States Government agencies to ensure that the drops succeeded." (Iran-Contra *Report*, p. 66.)

In short, the United States, through North, other United States officials in Washington and Central America and their "Enterprise", had accomplished "what Congress refused to fund — the air resupply of lethal material for the *contra* forces inside Nicaragua" (*Ibid.*, p. 60.)

456. Regularly scheduled flights dropped supplies to *contra* forces both in the south and in the north. By the middle of 1986, the Enterprise had spent over $16.5 million on arms, aircraft, direct payments to *contra* leaders and other aspects of the resupply operation. (*Ibid.*, at 377.) Deliveries reached a peak in September 1986, when more than 180,000 pounds of supplies were dropped to the southern front alone.

457. In October, one of the supply planes was brought down over Nicaragua, eventually bringing down with it North, the Enterprise and the whole network

of secret United States military assistance to the *contras*. By that time, however, the Congress had acted to renew overt military aid for fiscal year 1987.

458. The evidence summarized above must be considered in order to correct the mistaken conclusion into which the Court was led by the United States legislation purporting to ban assistance to the *contras* in fiscal year 1985 and confining it to "humanitarian aid" in fiscal year 1986. Nicaragua, like any other litigant, has a duty to assist the Court in its consideration of the case before it and is under a burden of due diligence to discover and present all evidence relevant to the determination. In the ordinary case, the Applicant can be held to the consequences of any failure to produce proof of facts.

459. This is no ordinary case, however, and there was no failure of diligence by Nicaragua. High officials working directly for the United States President deliberately concealed the relevant evidence not only from the Court but from the Congress and from the people of the United States and the world. (See generally, Ann. X, pp. 31-37.) Suppose that the United States had appeared and participated in the merits phase of the case and had falsely represented to the Court that only humanitarian assistance was being sent to the *contras* after September 1984. Can there be any doubt that if the misrepresentation were discovered while the case was still pending, in whatever phase, the Court would hear evidence as to the true state of affairs? To refuse to do so would permit the offending Party to benefit from the breach of its duty to the Court and in effect would condone the wrong.

460. Although the United States has decided not to appear in this case, it remains a Party and as such is under a duty not to deliberately mislead the Court. It has violated this duty even though it was not in the courtroom. In its Judgment the Court commented on the release by the United States State Department at the time of the oral hearings of a document entitled *Revolution Beyond Our Borders* setting forth the position of the United States on the facts and law of this case. The document was brought to the notice of the Court by the United States Information Office in The Hague after the oral hearings on the merits had started, and was in fact referred to in the Judgment. (*I.C.J. Reports 1986*, para. 73, at 44.) It was misleading in omitting any account of this secret United States assistance to the *contras* during the period covered. The information it purported to give should be viewed with this in mind.

461. Finally, quite apart from any duty the United States may owe the Court as a Party in the case, the fact is that the Court proceeded on an appreciation of the situation existing after September 1984 that we now know to be mistaken. The mistake was not due to any fault of Nicaragua but to deliberate and wrongful concealment by the United States. The Court should consider the evidence Nicaragua has introduced to correct the misrepresentation of the situation by the United States.

(b) *Evidence of Events Occurring after the Close of the Oral Hearings*

462. In the Judgment on the Merits, the Court said that

> "general principles as to the judicial process require that the facts on which its judgment is based should be those occurring up to the close of the oral proceedings on the merits of the case." (Merits, subpara. 58.)

463. In this passage, the Court was referring to its Judgment on the Merits, and it is certainly true that under "general principles of the judicial process", it would ordinarily be improper for the Court to take notice of facts occurring between the final submission of the case by the Parties and the rendition of

that Judgment. It is equally clear that the same principles do not preclude the presentation, in a later damages phase of the same case, of evidence to show the continuation of the conduct found to be unlawful in the merits phase and quantifying the losses resulting from it. In its Memorial on the Merits, Nicaragua anticipated this possibility and "reserve[d] the right to seek additional compensation for damage caused after 31 December 1984, and to present evidence in support of such claims". (Memorial of Nicaragua, Merits, **IV**, p. 38.)

464. The Court's prior cases support the view that it may hear evidence and argument concerning events occurring after the close of oral hearings. In the *Nuclear Tests* cases, the Court found it "necessary" to consider statements of the French Government, both those that were made before the oral proceedings and called to its attention at that time "and those subsequently made". (*I.C.J. Reports 1974*, at 264.) The Court said:

> "It would no doubt have been possible for the Court, had it considered that the interests of justice so required, to have afforded the Parties the opportunity, *e.g.*, by reopening the oral proceedings, of addressing to the Court comments on the statements made since the close of those proceedings." (*Ibid.*)

465. The Court quoted this passage in its Judgment on the Merits in the present case and remarked further that "[n]either Party has requested such action by the Court . . ." (Merits, para. 58.) The relevant passages of the Court's Judgment do not suggest that consideration of evidence of facts occurring after the close of oral hearings on the merits is improper. On the contrary, the implication is that the Court is fully empowered to hear such evidence "if the interests of justice so require", either on its own motion or at the request of a Party.

466. The interests of justice in this case surely require the reception of evidence of events subsequent to September 1985. As noted above, the internationally unlawful conduct of the United States involves a wrong of a continuing nature. Without this evidence, the Court will be unable to quantify the reparation that the United States is obligated to make under subparagraph (13) of the Dispositif. Since the case is still pending, there is no need to "reopen the oral proceedings" for this purpose.

467. The evidence of events occurring after the close of the oral hearings in September 1985 demonstrates that the covert program of United States military and paramilitary activities continued until October 1986. On 18 October 1986, a new appropriation of $100 million for fiscal year 1987 took effect. Of this amount, $70 million was available for military "assistance", with the remaining $30 million restricted to so-called "humanitarian" assistance. The limitations that previously had prohibited the CIA from using its secret "Reserve for Contingencies" were also lifted. United States Senate Majority Leader Robert Byrd informed in a Senate debate that as much as $400 million were to be allocated for the *contras* from this source[1]. Both the frequency and intensity of *contra* attacks reflected the new infusion. After 30 September 1987, a series of continuing appropriation bills provided additional funds. (Ann. X, pp. 37-46.)

468. Nicaragua does not seek any new determination of liability on the basis of this evidence. That the United States has breached its international obligations "by training, arming, equipping, financing and supplying the *contra* forces" has

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[1] 132 *Cong. Rec.* S11507 (13 August 1986).

been established by the Judgment on the Merits. Evidence of the continuation of these activities after the close of the oral hearings shows that the liability creating actions of the United States have continued to the present.

(c) *Damage Resulting from Unlawful United States Actions Since the Close of the Oral Hearings*

469. Nicaragua has also introduced evidence of the occurrence and monetary value of damage to persons and property resulting from the United States military and paramilitary activities since the close of the oral hearings. (Ann. I, 2*b*.) This information is essential to calculate the precise amount of the total reparation that will wipe out the consequences of the United States unlawful acts. Evidence of the quantum of harm occurring after the close of the hearing on the merits is admissible under any one of three independent legal principles on which the compensatory obligation of the United States may be based.

(*a*) The damages shown are the result of continuing internationally unlawful conduct of the United States. As noted above, in Nicaragua's view, the United States military and paramilitary activities constitute a breach of an international obligation of a continuing character and entails liability for all harm caused by it during the period of the breach. (See Chap. I, *supra*.)

(*b*) The damage done by the military and paramilitary activities in the period after the close of the oral hearings results from the acts of the United States before September 1985 that the Court adjudged to be unlawful. As the Court held, these United States acts were "crucial to the pursuit of their activities". (Para. 110.) The Court pointed to the continuation of *contra* activity after the prohibition of military aid in September 1984 as evidence that they were not completely dependent on United States assistance. We now know, however, that despite the prohibition, military aid continued in secret up to and after the oral hearing. Without this continuing United States action, the *contras* could not have achieved the level of organization and military efficacy they attained. The *contra* forces would have remained a handful of scattered bands of irregulars, engaged in cattle rustling and border raids as they did before the beginning of the internationally unlawful action of the United States. But for this action they would not have had the military capability to undertake the operations conducted in the period after the close of the oral hearings and to inflict the damage shown by the evidence.

(*c*) In subparagraph (12) of the Dispositif the Court held that the United States was "under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations; . . .". The United States has failed to comply with the Court's injunction. The United States is therefore now in violation of the international legal duty imposed by the Judgment. That violation entails the same obligation to compensate for the resulting damage as any other breach of an international obligation. The evidence of *contra* activities after the Judgment on the Merits quantifies the amount of reparation due for this breach. Before the close of the oral hearings, Nicaragua was, of course, unable to make submissions of fact or law concerning the breach of the obligation imposed by the Judgment and the reparation due on that account. The breach had not occurred and the obligation had not accrued at that time. The Applicant State should therefore have the opportunity now to introduce evidence of the breach of this obligation and the value of the losses incurred.

(d) *Conclusion*

470. Liability in the amount of the losses due to the military and paramilitary activities over the entire period from 1 December 1981 to the present is clear as a matter of legal principle[1]. Anything less would fail to fulfil the command of *Chorzów* that "reparation must, as far as possible, wipe out all the consequences of the illegal act . . .". Nicaragua has introduced evidence to establish the quantum of this harm in Annex I, *2b*. There is nothing in the Statute or Rules of the Court, nor in the principles of international law, to prevent the Court from considering any of this evidence to determine the amount of reparation the United States is obligated to pay in respect of its internationally unlawful actions in "training, arming, equipping, financing and supplying the *contra* forces . . .".

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[1] Since the internationally unlawful conduct here in issue involves an act of a continuing nature, it and its consequences may persist even after judgment in the current phase.

CONCLUSION

471. In this concluding chapter the Applicant State intends to present its views on certain questions subsidiary to the general issue of the assessment of compensation and to formulate its Submissions. However, first of all the Government of Nicaragua finds it necessary to explore some important procedural questions which inevitably arise in the unusual circumstances of this case.

A. Article 53 of the Statute

472. The Court does not need to be reminded that the proceedings in the merits phase of this case took place under Article 53 of the Statute and, according to the position adopted by the United States in its Note dated 13 November (signed by the Deputy-Agent), this aspect of the proceedings will remain during the present phase. In the course of preparing and presenting the case on the merits the Government of Nicaragua adopted a constructive approach to the problems of proof and did not in any sense seek to lay emphasis on the application of the provisions of Article 53. However, as the proceedings move through the present phase the Applicant State considers it to be useful to offer certain points for the consideration of the Court, which points relate to the problems of administering justice in a case such as the present.

473. The disadvantages faced by an Applicant State in proceedings involving a non-appearing Respondent State are often referred to: see, for example, the views of Sir Gerald Fitzmaurice, *British Year Book of International Law*, Volume 51 (1980), pages 89-122; and Thirlway, *Non-appearance before the International Court of Justice*, Cambridge, 1985, pages 137-157. As Fitzmaurice points out the result of non-appearance is that the Applicant State "becomes severely handicapped in the presentation of its case before the Court" and the principle of "equality of arms" as between litigants is placed in jeopardy (*op. cit.*, p. 91).

474. This being said, it is the intention of Nicaragua to make certain proposals in a constructive spirit and with the purpose of assisting the procedural economy of the present phase of the case.

475. In the first place the Government of Nicaragua would respectfully draw the attention of the Court to the advantages presented by the provisions of Article 49 of the Statute, and Articles 61 and 62 of the Rules (see Rosenne, *The Law and Practice of the International Court*, 1985, pp. 576-578; and Guyomar, *Commentaire du Reglement de la Cour internationale de Justice*, 1983, pp. 400-413). In the absence of the Respondent State the development of the pleadings is less suited to the pointing out and refinement of issues and both the Court and the Applicant State are placed at a certain disadvantage. In the circumstances of the present case it would be of considerable assistance to the Government of Nicaragua if, at a time convenient to the Court, Nicaragua were given some indications as to the particular issues of law on which the deliberations of the Court were likely to focus or issues of fact which the Court wishes to explore or to explore further. It goes without saying that an indication sufficiently in advance of the opening of the oral hearings would be of particular assistance to the Applicant State.

B. Informal Presentation of Material on the Part of the Respondent State

476. In the same context of seeking to promote the efficiency and economy of the proceedings Nicaragua requests that, if the Respondent State transmits by some informal mode material to the Court which, in a normal procedural context, would have been presented as evidence, the Applicant State be accorded the opportunity to comment upon material presented by informal methods.

C. The Scope of the Present Proceedings

477. The unusual character of the present proceedings involves a further procedural issue of great practical significance. The wrongs to which several parts of the Dispositif relate involve acts of State of a continuing character according to the draft articles on State Responsibility provisionally adopted by the International Law Commission. The relevant provisions are contained in Article 25 as follows:

> "Moment and duration of the breach of an international obligation by an act of the State extending in time
>
> 1. The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation.
>
> 2. The breach of an international obligation by an act of the State, composed of a series of actions or omissions in respect of separate cases, occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act. Nevertheless, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act not in conformity with the international obligation and so long as such actions or omissions are repeated.
>
> 3. The breach of an international obligation by a complex act of the State, consisting of a succession of actions or omissions by the same or different organs of the State in respect of the same case, occurs at the moment when the last constituent element of that complex act is accomplished. Nevertheless, the time of commission of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it."

478. The continuing character there referred to is relevant to the aspects of the Dispositif relating in particular to breaches of the principle of non-intervention. However, other findings are relevant, including the violation of sovereignty resulting from overflights.

479. As the Court will appreciate the Applicant State is justified in relying upon the perfectly logical principle of continuing acts. The question which therefore arises is the adjustment of the procedural modes available to the realities of the situation, that is to say, the continuation on the part of the United States of policies incompatible with the Judgment of the Court on the Merits. Given the fact that it is impossible to predict when these breaches of international law will cease it is impossible to make a final assessment of the reparation called for in relation to the continuing acts.

480. In the submission of the Government of Nicaragua, the only reasonable

possibility at this stage is to make a valuation of the damage that these continuing acts have already caused to Nicaragua. As to the future, reparation can only be assessed when the breaches having a continuing character and the consequences of those breaches have ceased. At that time, the reparation will have either to be agreed between the Parties or, if this proves to be impossible, to be the subject of a further phase of the present proceedings.

481. In this context, it must be recalled that in its Judgment on the Merits the Court stated that no provision in its Statute debars it from awarding reparation on a provisional basis. But, at that time, it felt that such a decision would not be "appropriate" at that stage of the proceedings. In the words of the Judgment :

> "There remains the request of Nicaragua (paragraph 15 above) for an award, at the present stage of the proceedings, of $370,200,000 as the 'minimum (and in that sense provisional) valuation of direct damages'. There is no provision in the Statute of the Court either specifically empowering the Court to make an interim award of this kind, or indeed debarring it from doing so. In view of the final and binding character of the Court's judgments, under Articles 59 and 60 of the Statute, it would however only be appropriate to make an award of this kind, assuming that the Court possesses the power to do so, in exceptional circumstances, and where the entitlement of the State making the claim was already established with certainty and precision. Furthermore, in a case in which the respondent State is not appearing, so that its views on the matter are not known to the Court, the Court should refrain from any unnecessary act which might prove an obstacle to a negotiated settlement. It bears repeating that
>
> > 'the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties ; as consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement ...'. (*Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13.)
>
> Accordingly, the Court does not consider that it can accede at this stage to the request made in the Fourth Submission of Nicaragua." (*I.C.J. Reports 1986*, p. 143, para. 285.)

482. Thus the Court did not consider an interim award "appropriate" by reference to a series of considerations which do not obtain at the time of the presentation of the present Memorial. At this stage the entitlement of the Applicant State is "established with certainty and precision", and there are, in a number of respects, "exceptional circumstances". Moreover, a negotiated settlement is not in prospect.

483. In the light of the principle accepted by the Court that an interim award may be justifiable if certain conditions are fulfilled, the Government of Nicaragua requests the Court :

(*a*) to award Nicaragua a sum as effective and complete compensation for all the damage that will be proved at the date of the Judgment (or of the closure of the proceedings), whether or not such damage is caused by breaches of international law extending in time or by acts not extending in time ; and

(*b*) to maintain the rights of Nicaragua to compensation for all damage which might occur as a result of these breaches having a continuing character, and as a consequence to maintain the power to reopen the proceedings if and when the circumstances generally and the interests of justice, in particular, make such a course necessary.

D. The Calculation of Present Value

484. The issue of compensatory interest may be conveniently dealt with at this juncture in the Memorial. There is a large literature and the principle of compensatory interest is generally accepted both in doctrine and in the jurisprudence of international tribunals. The general principle was well stated by the United States-German Mixed Claims Commission in its Administrative Decision No. III (1923):

> "Applying the principles announced in Administrative Decision No. II at pages 7-8, the Commission holds, that in all claims based on property taken and not returned to the private owner the measure of damages which will ordinarily be applied is the reasonable market value of the property as of the time and place of taking in the condition in which it then was, if it had such market value; if not, then the intrinsic value of the property as of such time and place. But as compensation was not made at the time of taking, the payment *now* or at a later day of the value which the property had at the time and place of taking would not make the claimant whole. He was *then* entitled to a sum equal to the value of his property. He is *now* entitled to a sum equal to the value which his property then had plus the value of the use of *such sum* for the entire period during which he is deprived of its use. Payment must be made *as of* the time of taking in order to meet the full measure of compensation." (*Reports of International Arbitral Awards*, II, p. 64 at p. 66.)

485. At the same time the award of interest as such is but one of several techniques available for the implementation of the principle of effective reparation. As the passage from the decision of the Mixed Claims Commission clearly indicates, what is at stake is the use of a technique to produce a figure which represents the present value of the compensation. Thus, provided an appropriate technique is employed in order to achieve an "actualization", the principle of compensatory interest is applied, so to speak, *mutatis mutandis*.

486. In respect of the reparation claimed for physical damage to property, loss of production, other consequential economic loss, and defence costs, the Government of Nicaragua has used the methodology for the calculation of present value described in detail in Annex VI.2.

487. The appropriate rate of interest should, in the submission of the Government of Nicaragua, be a function of the principle of effective reparation. Consequently the rate must depend upon general economic conditions and markets: see Brownlie, *System of the Law of Nations: State Responsibility*, Part I, 1983, page 229. In its Judgment in the "*Wimbledon*" case (1923), the Permanent Court adopted the view that the rate of interest is *relative* to the "present financial situation of the world" and "the conditions prevailing for public loans" (*1923, P.C.I.J., Series A, No. 1*, p. 32.) The methodology adopted by Nicaragua reflects these criteria and is explained in Annex VI.2.

488. On the basis that the principle of effective reparation has been applied by other means in each case the question of compensatory interest (or calculation of the present value) does not arise in the following categories of claim presented in this Memorial:

(*a*) The claim to reparation in respect of deaths and personal injuries;
(*b*) the claim to pecuniary satisfaction in respect of the four types of violation of sovereignty; and
(*c*) the claim to reparation in respect of moral damage.

E. Costs

489. Article 64 provides that "unless otherwise decided by the Court, each party shall bear its own costs". This text, taken together with Article 97 of the Rules, indicates the existence of a discretionary power to be exercised by the Court in the light of all the relevant circumstances, and according to general principles of law.

490. At this stage the Government of Nicaragua presents the formal submission that this is an appropriate case for costs on the basis of the considerations related fully in Chapter 8 (concerning reparation for moral damage). However, the Government of Nicaragua wishes to reserve its presentation of the claim for costs until such time as the Court finds it convenient to indicate its views on the precise procedural implications of Nicaragua's claim for costs. As the Court will no doubt appreciate, it is inappropriate to present a claim in the absence of adequate knowledge of the procedural framework: see the Memorial of Israel, *Aerial Incident* case (*Israel* v. *Bulgaria*, etc.), *I.C.J. Pleadings*, page 114 (para. 120); and Rosenne, *The Law and Practice of the International Court of Justice*, 2nd edition, 1985, pages 592-593.

F. Post-Judgment Interest

491. The Court is requested to include the payment of interest in its award of compensation to the Applicant State in the present proceedings (cf. the *Wimbledon*, *1923, P.C.I.J., Series A, No. 1*, pp. 32, 33).

SUBMISSIONS

492. The Government of the Republic of Nicaragua asks the Court to adjudge and declare as follows:

493. A. In accordance with the operative part of the Judgment of the Court dated 27 June 1986 the United States is under an obligation to make reparation to the Republic of Nicaragua for the following types of injury caused by breaches of the pertinent obligations of an international law character; thus:

First. In respect of the deaths and personal injuries relating to the findings contained in subparagraphs 3 and 4 of the operative part of the Judgment: the sum of US$900 million.

Second. In respect of material injury to property relating to the findings contained in subparagraphs 3 and 4 of the operative part of the Judgment (but apart from the losses caused by the specific attacks and mining of harbours referred to in subparagraphs 4, 6, 7 and 8): the sum at present value of US$275,400,000.

Third. In respect of the production losses relating to the findings contained in subparagraphs 3 and 4 of the operative part of the Judgment (but apart from the losses caused by the specific attacks and mining of harbours referred to in subparagraphs 4, 6, 7 and 8): the sum at present value of US$1,280,700,000.

Fourth. In respect of the material injury to property consequent upon the specific attacks to which the finding in subparagraph 4 of the operative part of the Judgment relates, together with the material injury to property consequent upon the mining of Nicaraguan harbours to which the findings in subparagraphs 6, 7 and 8 of the operative part of the Judgment relate: the sum at present value of US$22,000,000.

Fifth. In respect of the security and defence costs resulting from the unlawful conduct of the United States as defined in subparagraphs 3 to 9 inclusive of the operative part of the Judgment: the sum at present value of US$1,353,300,000.

Sixth. In respect of the damage caused by the general embargo on trade which is the subject of the findings contained in subparagraphs 10 and 11 of the operative part of the Judgment: the sum at present value of US$325,400,000.

Seventh. In respect of the damage caused to development potential of Nicaragua consequential upon the unlawful conduct of the United States as defined in subparagraphs 3 to 9 inclusive of the operative part of the Judgment: the sum at present value of at least US$2,546,400,000, which quantifies GDP losses but not their social consequences which cannot be valued technically in monetary terms.

Eighth. Without prejudice to the claim expressed in Submission 7 in respect of the damage to the social development of Nicaragua, in accordance with the considerations set forth in paragraphs 355 to 372 of Chapter 6: a sum of not less than US$2,000 million.

Ninth. In respect of the serious violations of the sovereignty of Nicaragua specified in subparagraphs 5 and 6 of the operative part of the Judgment and also in paragraph 251 of the Judgment: pecuniary satisfaction in the sum of US$1,068,700,000.

Tenth. On the basis of the elements of affront to international public order established in Chapter 8 of the present Memorial and the other principles invoked therein; accessory compensation for moral damage in the sum of US$2,443,200,000.

494. B. In the light of the continuing character of certain of the violations of international law obligations for which the United States has been held responsible, the Government of Nicaragua respectfully reserves the right to produce further evidence of damage, loss and injury flowing from such violations at the stage of the oral hearings.

495. C. On the basis of the considerations set forth in paragraphs 477 to 482 of the concluding Chapter, the Government of Nicaragua respectfully requests the Court:

Eleventh: To award Nicaragua a sum as effective and complete compensation for all the damage that will be proved at the date of the Judgment (or of the closure of the proceedings), whether or not such damage is caused by breaches of international law extending in time or by acts not extending in time; and

Twelfth: To maintain the rights of Nicaragua to compensation for all damage which might occur as a result of these breaches having a continuing character, and as a consequence to maintain the power to reopen the proceedings if and when the circumstances generally and the interests of justice, in particular, make such a course necessary.

496. D. On the basis of the considerations advanced in paragraphs 489 to 490 of the concluding Chapter, the Government of Nicaragua respectfully requests the Court to:

Thirteenth: Offer indications on the precise procedural implications of Nicaragua's claim for costs.

497. E. The Court is requested to:

Fourteenth: Include post-Judgment interest in the award of compensation resulting from the present proceedings.

Respectfully submitted.

(Signed) Carlos ARGÜELLO GÓMEZ,
Agent for the Republic of
Nicaragua.

29 March 1988.

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- I.2*b*. Human Injuries and Material Damage Caused to Nicaragua by Counter-revolutionary Activities
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- II.1. Affidavit from Leonel Arguello, President of INISER
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- II.4. Original Valuation of the Damage Arising from the Attack on Ports

Annex III. Economic Losses Arising from the Trade Embargo

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- IV.3. Methodology of Macroeconomic Estimation
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Annex V. Excerpts of the 1987 ECLAC Report on the Economy of Nicaragua

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[1] Not reproduced. [*Note by the Registry.*]

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IX.3. US Department of the Treasury, Office of Foreign Assets Control, Executive Order, 8 May 1985
IX.4. Proclamation No. 4941 of the President of the United States (sugar quota), 5 May 1982
IX.5. GATT, Report of the Panel, Imports of Sugar from Nicaragua (L/5607, 2 March 1984)
IX.6. GATT, Report of the Panel, "United States: Trade Measures Affecting Nicaragua", 13 October 1986, L/6053
IX.7. Central American Historical Institute, *Update*, 29 February 1988

Annex X. Chronological Statement of Evidence Relating to Continued US Military and Paramilitary Activities in and against Nicaragua, 1981-1988

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A. S. Rept. No. 100-216, "Report of the Congressional Committee Investigating the Iran-Contra Affair" (excerpts)
B. Report of the President's Special Review Board ("Tower Commission"), 26 February 1987 (excerpts)
C. Documents Released by the Congressional Committees Investigating the Iran-Contra Affair (selected documents)
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CORRESPONDENCE
CORRESPONDANCE

1. THE REGISTRAR TO THE SECRETARY OF STATE OF THE UNITED STATES OF AMERICA

(*Telex*)

9 April 1984.

In accordance with Article 40, paragraph 2, of the Statute of the International Court of Justice, I have the honour to inform you that the Government of the Republic of Nicaragua filed in the Registry of the Court today (9 April 1984) an Application Instituting Proceedings against the United States of America, and a request for the indication of interim measures under Article 41 of the Statute and Article 73 of the Rules of Court. The basis for the proceedings is stated to be that "the United States of America is using military force against Nicaragua and intervening in Nicaragua's internal affairs, in violation of Nicaragua's sovereignty, territorial integrity and political independence and of the most fundamental and universally accepted principles of international law". Details of alleged activities of the United States are given in the Application and an annex thereto. Basing itself upon Article 36 of the Statute and the acceptances by the United States and Nicaragua of Compulsory Jurisdiction under that Article Nicaragua requests the Court to adjudge and declare:

> "(*a*) That the United States, in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua, has violated and is violating its express Charter and treaty obligations to Nicaragua and, in particular, its Charter and treaty obligations under
>
> Article 2 (4) of the United Nations Charter;
> Articles 18 and 20 of the Charter of the Organization of American States;
> Article 8 of the Convention on Rights and Duties of States;
> Article 1, third, of the Convention concerning the Duties and Rights of States in the Event of Civil Strife;
>
> (*b*) That the United States, in breach of its obligation under general and customary international law, has violated and is violating the sovereignty of Nicaragua by
>
> armed attacks against Nicaragua by air, land and sea;
> incursions into Nicaraguan territorial waters;
> aerial trespass into Nicaraguan airspace;
> efforts by direct and indirect means to coerce and intimidate the Government of Nicaragua.
>
> (*c*) That the United States, in breach of its obligation under general and customary international law, has used and is using force and the threat of force against Nicaragua.
>
> (*d*) That the United States, in breach of its obligation under general and customary international law, has intervened and is intervening in the internal affairs of Nicaragua.
>
> (*e*) That the United States, in breach of its obligation under general and customary international law, has infringed and is infringing the freedom of the high seas and interrupting peaceful maritime commerce.

(*f*) That the United States, in breach of its obligation under general and customary international law, has killed, wounded and kidnapped and is killing, wounding and kidnapping citizens of Nicaragua.

(*g*) That, in view of its breaches of the foregoing legal obligations, the United States is under a particular duty to cease and desist immediately:

from all use of force — whether direct or indirect, overt or covert — against Nicaragua, and from all threats of force against Nicaragua;

from all violations of the sovereignty, territorial integrity or political independence of Nicaragua, including all intervention, direct or indirect, in the internal affairs of Nicaragua;

from all support of any kind — including the provision of training, arms, ammunition, finances, supplies, assistance, direction or any other form of support — to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary actions in or against Nicaragua;

from all efforts to restrict, block or endanger access to or from Nicaraguan ports;

and from all killings, woundings and kidnappings of Nicaraguan citizens.

(*h*) That the United States has an obligation to pay Nicaragua, in its own right and as *parens patriae* for the citizens of Nicaragua, reparations for damages to person, property and the Nicaraguan economy caused by the foregoing violations of international law in a sum to be determined by the Court. Nicaragua reserves the right to introduce to the Court a precise evaluation of the damages caused by the United States."

Provisional measures requested are as follows:

"That the United States should immediately cease and desist from providing, directly or indirectly, any support — including training, arms, ammunition, supplies, assistance, finances, direction or any other form of support — to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary activities in or against Nicaragua.

That the United States should immediately cease and desist from any military or paramilitary activity by its own officials, agents or forces in or against Nicaragua and from any other use or threat of force in its relations with Nicaragua."

Copies of Application and Request have been transmitted to you by air mail today, and copies delivered to US Embassy, The Hague.

(*Signed*) Santiago TORRES BERNÁRDEZ.

2. THE REGISTRAR TO THE SECRETARY OF STATE OF THE UNITED STATES OF AMERICA

9 April 1984.

Confirming my telex of today's date, a copy of which is enclosed, I have the honour to inform Your Excellency that the Government of the Republic of Nicaragua has this day filed in the Registry of the International Court of Justice an Application instituting proceedings against the United States of America. The Government of Nicaragua has also today filed a request for the indication of provisional measures under Article 41 of the Statute of the Court and Article 73 of the 1978 Rules of Court.

I have the honour to send Your Excellency herewith a certified copy of the Application, with an Annex, and of the request for the indication of provisional measures; I shall in due course transmit to you certified printed copies of the Application in the bilingual (English and French) edition which will be prepared by the Registry. I also enclose a copy of an Affidavit by the Foreign Minister of Nicaragua lodged with the Application and the request.

May I take this opportunity of drawing Your Excellency's attention to Article 40 of the Rules of Court which provides, in paragraph 2, that the respondent, upon receipt of the certified copy of the Application, or as soon as possible thereafter, should inform the Court of the name of its Agent. Paragraph 1 of the same Article provides that Agents shall have an address for service at the seat of the Court to which all communications concerning the case are to be sent.

3. THE REGISTRAR TO THE SECRETARY-GENERAL OF THE UNITED NATIONS

(Telex)

9 April 1984.

With reference to Article 40, paragraph 3, of the Statute of the Court I have the honour to inform you that on Monday, 9 April 1984, the Republic of Nicaragua filed in the Registry of the Court (1) an Application instituting proceedings against the United States of America on the grounds that:

> "the United States of America is using military force against Nicaragua and intervening in Nicaragua's internal affairs, in violation of Nicaragua's sovereignty, territorial integrity and political independence and of the most fundamental and universally accepted principles of international law";

(2) a request for the indication of provisional measures under Article 41 of the Statute and Article 73 of the Rules of Court. The measures requested are as follows:

> "That the United States should immediately cease and desist from providing, directly or indirectly, any support — including training, arms, ammunition, supplies, assistance, finances, direction or any other form of support — to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary activities in or against Nicaragua.
>
> That the United States should immediately cease and desist from any military or paramilitary activity by its own officials, agents or forces in or against Nicaragua and from any other use or threat of force in its relations with Nicaragua."

4. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

9 April 1984.

I have the honour to acknowledge receipt of the Application by the Republic of Nicaragua instituting proceedings against the United States of America, together with Annex A and an Affidavit by the Foreign Minister of Nicaragua, and the request for the indication of provisional measures in those proceedings, filed in the Registry by you today.

Your appointment as Agent of the Republic of Nicaragua in these proceedings has been duly noted, as has the fact that your address for service, under Article 40, paragraph 1, of the Rules of Court is the Embassy of the Republic of Nicaragua at The Hague.

The Government of the United States of America was immediately informed by telegram of the filing of the Application and request for the indication of provisional measures; in accordance with Articles 38, paragraph 4, and 73, paragraph 2, of the 1978 Rules of Court, certified copies of these documents were immediately transmitted to the Government of the United States of America.

5. THE UNITED NATIONS LEGAL COUNSEL TO THE REGISTRAR

(*Telex*)

10 April 1984.

Reçu 6 avril déclaration supplémentaire secrétaire d'Etat Etats-Unis d'Amérique en vertu article 36, statut ici ainsi conçue:

> "I have the honor on behalf of the Government of the United States of America to refer to the declaration of my Government of August 26, 1946, concerning the acceptance by the United States of America of the Compulsory Jurisdiction of the International Court of Justice, and to state that the aforesaid declaration shall not apply to disputes with any Central American State or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree.
>
> Notwithstanding the terms of the aforesaid declaration, this proviso shall take effect immediately and shall remain in force for two years, so as to foster the continuing regional dispute settlement process which seeks a negotiated solution to the interrelated political, economic and security problems of Central America."

Déclaration officiellement déposée 6 avril.

6. THE REGISTRAR TO THE SECRETARY-GENERAL OF THE UNITED NATIONS

11 April 1984.

With reference to my telex message (haj 0002-04) transmitted to you yesterday, I have the honour to communicate to you herewith a copy of the Application instituting proceedings against the United States of America filed by the Government of the Republic of Nicaragua in the Registry of the Court on 10 April 1984. I also enclose a copy of the French translation of that Application prepared by the Registry. The usual printed bilingual edition is in preparation, and copies will be supplied to you as soon as possible with a view to the notification contemplated by Article 40, paragraph 3, of the Statute of the Court.

I also have the honour to communicate to you herewith a copy of the Request for the indication of provisional measures under Article 41 of the Statute of the Court filed by the Republic of Nicaragua simultaneously with its Application, and a copy of the French translation prepared by the Registry.

7. THE AMBASSADOR OF THE UNITED STATES OF AMERICA TO THE NETHERLANDS TO THE REGISTRAR

13 April 1984.

I wish to acknowledge on behalf of the Government of the United States of America receipt of your letter of April 9, 1984, transmitting (1) a certified copy of an application of the Government of Nicaragua to the Court naming the Government of the United States as respondent, and (2) a certified copy of a request of the Government of Nicaragua for the indication of provisional measures with respect to that application.

In accordance with Article 40 (2) of the Rules of Court, I wish to advise you that the United States designates as its Agent with regard to Nicaragua's application the Honorable Davis R. Robinson, Legal Adviser of the Department of State, and as its Deputy Agent Mr. Daniel W. McGovern, Principal Deputy Legal Adviser, U.S. Department of State. All communications to Mr. Robinson or Mr. McGovern may be addressed to the United States Embassy in The Hague.

In accordance with Article 31 of the Rules of Court, the Agent of the United States is prepared to meet with the President of the Court at the President's convenience to discuss questions of procedure, and would request such a meeting before the scheduling of hearings or other action in the case. As you are aware, Mr. Robinson is presently in The Hague and could meet with the President at a mutually convenient time next week.

The United States is of the firm view that, under the terms of the United States Declaration of August 14, 1946, assenting to jurisdiction of the Court, and its communication of April 6, 1984, the Court lacks jurisdiction to consider the application of the Government of Nicaragua. *A fortiori* the Court lacks jurisdiction to indicate the provisional measures requested by the Government of Nicaragua.

The United States notes that the allegations of the Government of Nicaragua comprise but one facet of a complex of interrelated political, social, economic and security matters that confront the Central American region. Those matters are the subject of a regional diplomatic effort, known as the "Contadora Process", which has been endorsed by the Organization of American States, and in which the Government of Nicaragua participates. This process is strongly supported by the United States as the most appropriate means of resolving this complex of issues, consistent with the United Nations Charter and the Charter of the Organization of American States, in order to achieve a durable peace in the region. The concern of the United States is that bilateral judicial proceedings initiated by Nicaragua would impede this ongoing multilateral diplomatic process. This concern motivated the decision of the United States which was communicated to the Secretary-General on April 6, 1984.

The same concern makes the indication of the provisional measures requested by Nicaragua particularly inappropriate at this time. In the present situation in Central America, the indication of such measures could irreparably prejudice the interests of a number of States and seriously interfere with the negotiations being conducted pursuant to the Contadora Process.

Finally, the United States notes that the events of which the Government of Nicaragua complains allegedly took place over at least three years. See Annex A to application. These circumstances are inconsistent with an argument that there is urgency to Nicaragua's request for the indication of provisional measures.

For the reasons stated above concerning jurisdictional questions, the United States requests the Court to strike Nicaragua's application from the Court's list of pending matters. Alternatively, the United States considers that the circumstances and the extraordinary character of the measures requested by Nicaragua require an opportunity for written submissions by the parties and, thereafter, an oral hearing on Nicaragua's request for the indication of provisional measures. The Agent of the United States will be prepared to discuss with the President the scheduling of written submissions by the parties and oral proceedings before the Court.

(*Signed*) L. Paul BREMER, III.

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8. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

13 April 1984.

With reference to the Application instituting proceedings filed by the Republic of Nicaragua in the Registry of the Court on 9 April 1984, I have the honour to transmit to you herewith a copy of a letter from the Ambassador in The Hague of the United States of America, dated 13 April 1984 and received in the Registry today.

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9. THE REGISTRAR TO THE AMBASSADOR OF THE UNITED STATES OF AMERICA TO THE NETHERLANDS

13 April 1984.

I have the honour to acknowledge receipt of the letter of today's date whereby Your Excellency, on behalf of the Government of the United States of America, has *inter alia* advised me of the appointment of Mr. Davis R. Robinson and Mr. Daniel W. McGovern to be respectively the Agent and Deputy Agent of the United States with regard to the application filed in the International Court of Justice on 9 April 1984 by the Government of Nicaragua. I note that communications to them should in this case be transmitted to the United States Embassy in The Hague.

I have communicated copies of your letter to the Court and to the Agent of Nicaragua.

10. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA[1]

16 April 1984.

I have the honour to confirm that, as you were informed yesterday evening by the Deputy-Registrar, the President of the International Court of Justice will receive the Agents and Counsel of the United States of America and of Nicaragua, in his Chambers at the Peace Palace on Monday, 16 April 1984, at 12.30.

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11. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

16 April 1984.

With reference to the meeting held in the chambers of the President of the Court this morning between the President and the Agents and Counsel for the Parties in the proceedings instituted by Nicaragua against the United States of America I have the honour on the instructions of the President of the Court, to inform Your Excellency that the President wishes by the present letter to convey to both Agents in writing, with a view to its transmittal to their respective Governments, the appeal he then made in exercise of the power conferred on him by Article 74, paragraph 4, of the Rules of Court, namely: "I draw the attention of both Parties to the need to act in such a way as will enable any Order the Court may make on the request for provisional measures to have its appropriate effects."

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12. THE AGENT OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

17 April 1984.

I have the honour to inform you that the Republic of Nicaragua intends to abstain from exercising its prerogative to choose an *ad hoc* judge in accordance with Art. 31 of the Statute of the Court in respect of the proceedings relating to interim measures of protection as requested by the Republic of Nicaragua on the 9th of April.

The Government of Nicaragua would emphasize that it reserves the right to choose an *ad hoc* judge in respect of other proceedings in the present case subsequent to the making of an order in respect of interim measures; in particular, Nicaragua reserves the right to choose an *ad hoc* judge in any proceedings regarding intervention either in respect to interim measures of protection or in any other proceedings in this case.

(*Signed*) Carlos ARGÜELLO GÓMEZ.

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[1] A communication in the same terms was sent to the Agent of the Republic of Nicaragua.

13. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

17 April 1984.

I have the honour to transmit to you herewith a copy of a letter just received from the Agent of Nicaragua in the proceedings instituted by Nicaragua on 9 April 1984 against the United States of America, with reference to the claim by the Government of Nicaragua to exercise the right conferred by Article 31, paragraph 2, of the Statute of the Court to choose a judge *ad hoc* to sit in the case.

14. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA[1]

18 April 1984.

On instructions from the President of the International Court of Justice, I have the honour to inform your Excellency that, pursuant to Article 74, paragraph 3, of the Rules of Court, Wednesday 25 April 1984, at 10 a.m., has been fixed as the date for the opening of a hearing on the request by the Government of Nicaragua for the indication of provisional measures in the proceedings instituted by Nicaragua on 9 April 1984 against the United States of America.

15. THE MINISTER OF FOREIGN AFFAIRS OF EL SALVADOR TO THE REGISTRAR

(Telegram)

19 April 1984.

Although not a party to the case brought before the Court by the Government of Nicaragua requesting provisional measures related to its complaint against alleged U.S. military activities in the region, the Government of El Salvador wishes to provide the Court with certain information on the circumstances surrounding the complaint by Nicaragua and the whole Central American situation.

The problems besetting the Central American region are many and interrelated. They are political, economic, social, human rights and security issues, some are bilateral and others are multilateral, some are legal while many are of a non-legal nature. The Government of El Salvador recalls that the Contadora Process in which Nicaragua is a participant was initiated to deal with the entire array of these questions and that it is now engaged actively in its work. The Governments of El Salvador and Nicaragua, with the other concerned governments in the region, have endorsed the Contadora Process without reservations, as has the Organization of American States. The Government of El Salvador continues to consider the Contadora Process as the uniquely appropriate form, consistent with Article 33 of the Charter of the United Nations and Article 24 of the Charter of the Organization of American States, in which to seek a realistic, durable, regional peace settlement that would take the manifold legitimate interests of each participating State into full account.

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[1] A communication in the same terms was sent to the Agent of the United States of America.

The issues raised by the Government of Nicaragua cannot be divorced from the regional issues under negotiation in the Contadora Process. In the view of my Government, the complaint by Nicaragua, if considered by the Court, or if the provisional measures were ordered by the Court, would damage prospects for success of multilateral negotiations *within* the Contadora framework, especially if such measures were applied to only one party to the dispute. Therefore, my Government requests that the Court take seriously into consideration its views as expressed above, and that the Court take no action with respect to the requested provisional measures which would be contrary to the negotiating process now taking place within the Contadora Group for a comprehensive, regional solution in Central America.

(*Signed*) Fidel CHAVEZ MENA.

16. THE GOVERNMENT OF COSTA RICA TO THE REGISTRAR

(*Telegram*)

19 April 1984.

With regard to the case presented before the International Court of Justice by the Government of Nicaragua, the Government of Costa Rica wishes, by this means, to present for the consideration of the Court the following communication:

"Costa Rica declares its permanent neutrality in belligerent conflicts which affect other States in a Presidential Proclamation on November 17, 1983. The neutrality of Costa Rica is active, and for this reason fully compatible with the rights of Costa Rica as a member of the United Nations and the Organization of American States in all that relates to the preservation of peace and international security, as well as in relation to those activities conducive to a peaceful solution of disputes between States.

As a perpetually neutral State and a country situated in the Central American region, Costa Rica has a special interest in the peaceful solution of disputes and conflicts which affect this area of the world. For this reason and in pursuit of this interest in peace and international order, the Government of Costa Rica would like to provide its observations concerning the case presented by the Government of Nicaragua against the United States of America and its application for the adoption of provisional measures in conformity with Article 41 of the Statute and Article 73 of the Rules of Court, without these observations being considered as an intervention in the case, in accordance with the doctrine of Article 62 of the Statute of the Court.

Based on the above, the Government of Costa Rica wishes to make the following observations:

1. The "case" presented by the Government of Nicaragua before the Court touches upon only one aspect of a more generalized conflict that involves other countries within the Central American area as well as countries outside the region. Faced with such conflicts, a group of American nations, within the doctrine of Article 23 of the Charter of the Organization of American States, created the

so-called "Forum of Contadora" in order to seek at a sub-regional level, a solution to such conflicts, since their continuation would constitute a grave threat to the international peace and security of the entire Central American area. Within this forum intense diplomatic negotiations have taken place to resolve the conflicts, not only in their military aspect, but also their causes, which are of a political, social and economic nature both internal and external. This process is very far along and has as participants all the countries of the region, specifically, Colombia, Mexico, Panama, Venezuela, Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua, and with the support of the international community.

2. The Government of Costa Rica is of the opinion that whatever measure which the Court might adopt in the "case" presented for its consideration, taking such measures outside the context of the complete political and military situation that prevails in the Central American region, could become a distorting factor in the difficult equilibrium sought by the Forum of Contadora in a broader framework of solutions and could compromise, if not undertaken with prudence and equity, all possibilities of success for the "Forum of Contadora".

3. Therefore, Costa Rica without pretending to judge in any way the appropriateness of the provisional measures which the Court may decide, expresses the following opinion:

(i) Whatever provisional measure the Court may adopt, should entail obligations and commitments by both parties to the dispute.

(ii) The adoption of any provisional measure whatever its nature, should take into account the existence of the diplomatic effort which is being carried out in the Contadora Group, with the participation of all the countries of the area, and which seeks a solution to the conflicts such as those which have been brought before the Court.

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17. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

19 April 1984.

I have the honor to acknowledge receipt of your letter of 18 April 1984, indicating that the Court will open its hearing pursuant to Article 74, paragraph 3, of the Rules of Court on the request of the Government of Nicaragua for the indication of provisional measures on Wednesday, April 25, 1984, at 10.00 a.m.

The United States wishes to repeat its concern that the convocation of the hearing at that early date will not afford it sufficient opportunity, within the meaning of Rule 74 (3), to be fairly "represented" at the hearing since there is manifestly inadequate time to develop fully its presentation of the factual circumstances and of legal argumentation. Despite this concern, I have the honor to inform the Court that the United States intends to appear at the hearing. Such appearance is with full reservation of the rights and defenses of the United States, including, but not limited to, the assertion of the United States that the entire matter is clearly outside of the jurisdiction of this honorable Court. The United States specifically reserves, *inter alia*, the right fully to address in due course the questions which may be raised by Preliminary Objection pursuant to the procedures established under Article 79 of the Rules of Court. The United States appearance is also without prejudice to any other rights that it may have.

(*Signed*) Davis R. Robinson.

18. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

19 April 1984.

I have the honour to acknowledge receipt of the letter of today's date by which you have indicated the position of the United States with regard to its appearance at the hearing to be held as from 10 a.m. on Wednesday 25 April 1984 on the request made by Nicaragua for the indication of provisional measures.

I have transmitted a copy of your letter to the Agent of Nicaragua.

19. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

23 April 1984.

I have the honour to refer to the Application of the Republic of Nicaragua of 9 April 1984 (the "Application"), to its Request of the same date for the indication of provisional measures under Article 41 of the Statute of the Court (the "Request"), and to Article 48 of the Statute of the Court. The United States wishes to bring to the notice of the Court information that the United States has recently received, establishing that Nicaragua has not accepted the compulsory jurisdiction of the Court under Article 36 of the Statute of the Court. Consequently, the Application does not meet the requirements of Article 38 of the Rules of Court, particularly paragraph 2 thereof. The United States respectfully submits, therefore, that an immediate decision should be taken to preclude any further proceedings on the Application and the claims contained therein or on the Request.

In this regard, I have the honour to call attention to the following:

1. The Application refers in its opening paragraph to "... the Declarations made by the Republic of Nicaragua and by the United States of America accepting the jurisdiction of the Court as provided for in Article 36 of the Statute of the International Court of Justice . . ." The Application further states in paragraph 13 thereof that "[b]oth the United States and Nicaragua have accepted the compulsory jurisdiction of the Court under Article 36 of the Statute of the Court". Both the reference and the statement are incorrect. As of the date of the filing of the Application, Nicaragua had not accepted the compulsory jurisdiction of the Court.

2. Nicaragua has not specified in the Application the legal grounds upon which the jurisdiction of the Court is said to be based. In the absence of any other indication, the United States assumes that Nicaragua is seeking to rely upon Article 36, paragraph 5, of the Statute of the Court, which reads:

> "Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."

On 14 September 1929, Nicaragua signed the Protocol of Signature of the Statute of the Permanent Court of International Justice. The Protocol of Signature provided:

> "The present Protocol, which has been drawn up in accordance with the

> decision taken by the Assembly of the League of Nations on the 13th December, 1920, is subject to ratification. Each Power shall send its ratification to the Secretary-General of the League of Nations; the latter shall take the necessary steps to notify such ratification to the other signatory Powers. The ratification shall be deposited in the archives of the Secretariat of the League of Nations."

But Nicaragua never ratified the Protocol of Signature of the Statute of the Permanent Court. Thus, the declaration which Nicaragua made on 24 September 1929 purporting to accept the Optional Clause never entered into force. As a result, Nicaragua never accepted the compulsory jurisdiction of the Permanent Court. Consequently, Article 36, paragraph 5, of the Statute of the International Court of Justice is inapplicable, and cannot serve as the basis of jurisdiction over the Application and the claims contained therein or over the Request.

3. *The Report of the Permanent Court of International Justice 1929-1930, Series E, No. 6,* at 145-146, lists Nicaragua among the "States having signed [the Optional Clause] without condition as to ratification but not ratified the Protocol of Signature of the Statute". These are described as "States not bound by the Clause". *Idem* at 146. This Report does not include Nicaragua in the list of "States at present bound by the [Optional] Clause". *Idem* at 145. Nicaragua is similarly listed in subsequent issues of the *Reports of the Permanent Court of International Justice.* See, e.g., *Report 1930-1931, Series E, No. 7,* at 159, 161, 457; *Report 1937-1938, Series E, No. 14,* at 59-60. See also, *Collection of Texts Governing the Jurisdiction of the Court, Series D, No. 6,* at 19 (1932).

4. On 29 November 1939, Nicaragua addressed a telegram to the League of Nations stating that an instrument of ratification of the Protocol of Signature of the Statute would follow. See *Sixteenth Report of the Permanent Court of International Justice* (15 June 1939 to 31 December 1945), *Series E, No. 16,* page 331; International Court of Justice, *Yearbook 1982-1983,* page 79, footnote 1. I am informed that the records of the League of Nations in Geneva reveal that no instrument of ratification from Nicaragua was ever received. On 30 November 1939, the Acting Legal Adviser of the League of Nations informed the Government of Nicaragua that the Secretariat of the League of Nations was at the disposal of Nicaragua to facilitate the deposit of such an instrument. (See Annex I hereto, para. 3.) Later, on 16 September 1942, the Acting Legal Adviser (M. Emile Giraud) wrote to the Minister for Foreign Affairs of Nicaragua, drawing attention to Nicaragua's telegram of 29 November 1939 and adding:

> "I have never received the instrument of ratification, the deposit of which is necessary to bring Nicaragua's obligation into being."

(See Annex I hereto at para. 5.) Attached to Annex II hereto is a duly authenticated copy of a letter dated 13 May 1943 from the United States Ambassador to Nicaragua to Judge Manley O. Hudson. In that letter, there is further evidence that as of that date, Nicaragua had not ratified the Protocol of Signature and therefore was not bound thereby. Additional confirmation of the non-ratification of the Protocol of Signature by Nicaragua appears in the Twenty-First List of Signatures, Ratifications and Accessions in respect of Agreements and Conventions concluded under the Auspices of the League of Nations, which includes Nicaragua in the list of "Signatures not yet perfected by Ratification". See League of Nations, *Official Journal,* Special Supplement No. 193 (10 July 1944), at pages 37, 42-43. So far as the United States has been able to ascertain, there is no indication that Nicaragua ratified the Protocol of Signature before the Charter of the United Nations entered into force on 24 October 1945, or before the League of Nations and the Permanent Court of International Justice were dissolved on 18 April 1946. That being so, Nicaragua cannot be deemed to have accepted the compulsory jurisdiction of the International Court of Justice under Article 36, paragraph 5, of the Statute of the Court.

5. The United States is further informed that Nicaragua has never deposited with the Secretary-General of the United Nations a declaration accepting the Court's compulsory jurisdiction pursuant to Article 36, paragraph 2, of the Statute of the Court.

6. In the circumstances, the Court is without jurisdiction to entertain the Application of the Government of the Republic of Nicaragua or any part of that Application, and the Request for the indication of provisional measures does not relate to any case properly before the Court. For these reasons and in consideration of Article 48 of the Statute of the Court, the United States respectfully seeks from the Court an immediate decision which will preclude any further proceedings on the Application and the claims contained therein, or on the Request.

7. This letter is without prejudice to any other rights, claims or positions of the United States, whether under the Statute or the Rules of Court or otherwise, including, without limitation, such as may relate to the jurisdiction of the Court or the admissibility of the Application.

Annex I

1. Since receipt of the Registrar's letter of 9 April 1984 (#71558), the United States has examined whether Nicaragua accepted the compulsory jurisdiction of the Permanent Court of International Justice. Inquiries in the United Nations Secretariat in New York disclosed that any relevant materials would be located in the League of Nations Archives in Geneva. From inquiries made in Geneva, the following has been established.

2. Nicaragua's telegram of 29 November 1939, referred to in the letter of the Agent of the United States of 23 April 1984, was received in the League of Nations in Geneva on 30 November 1939.

3. On 30 November 1939, the Acting Legal Adviser of the League of Nations wrote a letter to the Nicaraguan Ministry for Foreign Affairs in which, after acknowledging receipt of the telegram of 29 November 1939, he stated:

> "En réponse, je m'empresse de vous informer que le service compétent du Secrétariat se tient à la disposition de votre gouvernement pour lui faciliter les formalités relatives au dépôt dudit instrument de ratification."

There is no reply to that letter in the file of the League of Nations.

4. On 4 August 1942, the late Judge Manley O. Hudson, then in residence at Harvard Law School, wrote to inquire as to the status of Nicaragua's ratification of the Protocol of Signature. On 15 September 1942, the Acting Legal Adviser of the League of Nations, M. Emile Giraud, replied (in part):

> "We have not received the ratification necessary to complete the signature of the Court Protocol and at the same time to bring into force the obligations concerning Article 36. But on November 29th, 1939, the Secretary-General was informed by telegram that the Court Protocol was ratified by the

President of the Republic of Nicaragua. We have however never received the instrument of ratification itself, which should have been sent to us. Nicaragua is therefore not bound either by the Protocol or by the Optional Clause."

5. On 16 September 1942, Acting Legal Adviser Giraud sent the following letter to the Minister for Foreign Affairs of Nicaragua:

> "Par un télégramme en date du 29 novembre 1939, vous avez bien voulu me faire savoir que le protocole de signature du Statut de la Cour permanente de Justice internationale (du 16 décembre 1920) avait été ratifié par le président de la République de Nicaragua et que l'instrument de ratification serait envoyé au Secrétariat.
>
> Or, je n'ai jamais reçu cet instrument de ratification dont le dépôt est nécessaire pour faire naître effectivement l'obligation. Peut-être cet instrument s'est-il perdu en cours de route.
>
> J'ai tenu à attirer votre attention sur cette question."

6. This letter of 16 September 1942 is the last document contained in the United Nations Library, Geneva, League of Nations Archives, 1933-1946, File No. 3C/17664/1589. This file contains all the materials for the period from 1933 to 1946 relating to Nicaragua's actions in connection with the Protocol of Signature of the Statute of the Permanent Court of International Justice and the Optional Clause.

[When copies of the original documents on file in Geneva are received in The Hague, the Agent of the United States will transmit copies to the Registrar.]

ANNEX II

1. While the inquiries to which Annex I refers were being pursued, the Department of State of the United States Government in Washington, D.C., conducted an examination of its own archives to determine whether they contained any relevant information on the possible acceptance by Nicaragua of the compulsory jurisdiction of the Permanent Court of International Justice. That examination revealed despatch No. 1035 of 13 May 1943 from the United States Ambassador to Nicaragua forwarding to the Department of State a letter of the same date from the Ambassador to Judge Hudson reporting on the results of the Ambassador's inquiries at the Ministry for Foreign Affairs of Nicaragua. That letter from the Ambassador to Judge Hudson reported that the Foreign Minister of Nicaragua had informed the Ambassador that as of that day, "there is no record of the instrument of ratification having been transmitted to Geneva". An authenticated copy of the full text of the despatch and enclosed letter is appended to this Annex II[1].

2. The Department of State has found no further documentation, from any source, relating to this matter.

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[1] Not reproduced.

20. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

24 April 1984.

I have the honour to confirm the transmittal made late last night to the Embassy of Nicaragua at The Hague of a copy of a communication received yesterday evening from the Agent of the United States of America in the proceedings instituted by your Government before the International Court of Justice. An additional copy is attached herewith.

21. THE AGENT OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

24 April 1984.

I have the honour to refer to the letter dated 23 April 1984 to the Registrar by the Agent of the United States of America in the proceedings relating to the Application of the Republic of Nicaragua of 9 April 1984.

On behalf of the Republic of Nicaragua I wish to state that the matters referred to by the Agent of the United States, are matters, which can only be taken into consideration by the Court in the course of the hearings on the request for interim measures of protection and then only in so far as these matters may be relevant to those proceedings. This view is, of course, in accordance with Article 36 (6) of the Statute of the Court, which provides that in the event of a dispute as to whether the Court has jurisdiction the matter shall be settled by the decision of the Court.

Without conceding in any way the appropriateness of the United States' argument at this point in these proceedings, and furthermore, without prejudice to other arguments that Nicaragua will present at the appropriate time to any objections to the Court's jurisdiction, I would like to state:

1. Nicaragua ratified in due course the Protocol of Signature of the Statute of the Permanent Court.
2. Apart from the 1929 Declaration of Nicaragua accepting without qualification the compulsory jurisdiction of the Permanent Court, which Nicaragua contends to be fully effective, there are in force other treaties which provide this Court jurisdiction over the Application filed by Nicaragua on 9 April 1984.

The Republic of Nicaragua reserves the right to review all pertinent issues of law and fact at the proper time.

22. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

24 April 1984.

I have the honour to transmit to you herewith a copy of a letter, dated 24 April 1984 and received in the Registry today, from the Agent of Nicaragua, in connection with the proceedings instituted by the Republic of Nicaragua on 9 April 1984.

23. LE CHARGÉ D'AFFAIRES DE L'AMBASSADE DU HONDURAS AU GREFFIER

24 avril 1984.

J'ai l'honneur, suivant les instructions reçues de mon gouvernement, de vous adresser ci-joint, copie de la note que le Gouvernement du Honduras vous transmet par l'intermédiaire de Son Excellence le Secrétaire général des Nations Unies.

Je saisis cette occasion pour renouveler à Monsieur le Greffier les assurances de ma plus haute considération.

(*Signé*) Arias de Saavedra y Muguelar.

(*Traduction non officielle*)

(*Télex*)

Tegucigalpa, le 18 avril 1984.

Son Excellence Monsieur Javier Pérez de Cuéllar
Secrétaire général de l'Organisation des Nations Unies
New York, NY, USA

Monsieur le Secrétaire général,

J'ai l'honneur de présenter mes compliments à Votre Excellence à l'occasion de vous exprimer la grave préoccupation du Gouvernement du Honduras au sujet des nouvelles démarches internationales entreprises par le Gouvernement du Nicaragua afin de soustraire à la compétence du moyen de solution pacifique spécial promu par le groupe de Contadora, formé par la Colombie, le Mexique, le Panama et le Venezuela, la solution de la crise politique, économique, sociale et de sécurité qui frappe la région centroaméricaine et dont la nature complexe exige une solution globale et multilatérale.

Il est de la connaissance de Votre Excellence que cette crise est le résultat du débordement des conflits internes de quelques pays de la zone, du manque de respect aux droits de l'homme, du sous-développement économique et social et très spécialement de la course aux armements et de l'accroissement démesuré des forces armées du Gouvernement du Nicaragua, engagé à promouvoir le déséquilibre de gouvernements voisins par l'encouragement, le financement, l'entraînement et la prestation d'assistance logistique et de communications aux groupes insurgés d'autres pays centroaméricains avec le but d'instaurer des gouvernements qui lui soient proches.

C'est précisément pour chercher une solution intégrale à la crise centroaméricaine que le groupe de Contadora proposa une négociation directe entre les Etats de la région, qui fut acceptée par le Gouvernement du Honduras et à laquelle il donna son appui le plus large en participant activement à toutes les réunions convoquées par ce même groupe.

Le Gouvernement du Honduras présenta le 4 avril 1983, au sein du Conseil permanent de l'Organisation des Etats américains, un projet de résolution aux fins de pacification de la zone centroaméricaine. A la demande du groupe de

Contadora, présentée au même Conseil par le représentant permanent de la Colombie, le Honduras accepta la suspension de la discussion dudit projet de résolution afin que les négociations directes promues par ce groupe de pays membres de l'Organisation des Etats américains aient l'opportunité d'aboutir à des résultats positifs.

A ce sujet, Son Excellence le ministre mexicain des relations extérieures, Monsieur Bernardo Sepúlveda, a reconnu, dans la conférence de presse tenue dans la capitale de son pays le 13 avril 1983, que l'attitude conciliatoire montrée par le Honduras au sein de l'Organisation des Etats américains a rendu possible les gestions entamées par le groupe de Contadora. Le ministre mexicain, se référant à la réunion tenue à Panama par les ministres qui intègrent le groupe et qui décidèrent leur intervention a dit textuellement :

> « On s'avisa dans une première instance que le plus urgent était de s'assurer que le Conseil permanent de l'OEA n'inhibait pas l'action des ministres membres du groupe Contadora dans leur initiative pour trouver des formules de solution en Amérique centrale. Il s'agissait là d'une question urgente, car le Conseil permanent de l'OEA devait examiner un projet de résolution présenté par le Honduras ce même lundi après-midi. Heureusement et grâce à une série de conversations tenues avec d'autres parties intéressées dans cette question, il fut accordé d'ajourner son étude au sein du Conseil permanent, permettant ainsi de transférer la question de la tribune régionale à celle de Panama, c'est-à-dire aux ministres des affaires étrangères du groupe Contadora. En même temps on a compris l'opportunité de faire une démarche auprès des Nations Unies pour qu'elles s'abstiennent de toute action qui doublerait celle qui venait de s'entamer à Panama lundi dernier.
>
> Les parties intéressées ont accueilli avec beaucoup d'intérêt la proposition qu'on leur faisait et elles ont décidé de demander au Conseil permanent de l'OEA l'ajournement de la question. Celle-ci fut la première action prise à ce sujet et qui, je répète — déclara le ministre Sepúlveda — nous laissa libres quant à la capacité d'action pour assumer la juridiction directe sur ce sujet. »

Au cours de plus d'une année de négociations multilatérales délicates, nous avons pu constater l'appui très large reçu par le groupe de Contadora, tant de la part de l'Organisation des Etats américains (AG/Rés.675-XIII-0/83) comme de l'Assemblée générale (Rés.38/10) et du Conseil de sécurité de l'Organisation des Nations Unies (Rés.530 (1983)) ainsi que de la part de la communauté internationale en général, sans distinction de systèmes idéologiques, politiques, économiques ou juridiques.

C'est pour cette raison que le Gouvernement du Honduras considère nécessaire et du plus grand intérêt pour les Etats de la région centroaméricaine et autres Etats pacifiques, que le groupe de Contadora poursuive ses efforts dans la recherche d'une paix durable et stable pour la région, sans que cette procédure soit exposée à la frustration par le recours qu'un pays pourrait faire à d'autres moyens de règlement pacifique.

D'accord avec cette thèse, partagée par la majorité des pays centroaméricains et par le groupe de Contadora, le Gouvernement du Honduras tient à signaler le danger que supposerait le traitement simultané de la crise centroaméricaine par des différentes instances internationales — comme l'a prétendu le Gouvernement du Nicaragua — lorsque des négociations directes sont déjà en cours. Cette thèse s'est vue confirmée par le renvoi de la question centroaméricaine au groupe de Contadora, avec l'appui inconditionnel du Conseil de sécurité des

Nations Unies, de l'Assemblée générale de cette même organisation et de l'Assemblée générale de l'Organisation des Etats américains.

Le Gouvernement du Nicaragua essaye de nouveau de se jouer du procès de négociation de Contadora en prétendant soumettre la crise centroaméricaine — de nature essentiellement politique — à la connaissance et résolution de la Cour internationale de Justice, au détriment des négociations en cours et en méconnaissant même les résolutions de l'Organisation des Nations Unies, de l'Organisation des Etats américains et l'appui international total qu'a mérité cette voie de pacification.

Il va sans dire que les négociations poursuivies par les pays de l'Amérique centrale dans le cadre de Contadora sont clairement autorisées par l'article 52 de la Charte de l'ONU et par l'article 23 de la Charte de l'OEA, qui favorisent les accords régionaux des différends.

Le Gouvernement du Honduras, sans participer ni prétendre intervenir de quelque manière que ce soit dans la procédure entamée par le Nicaragua contre les Etats-Unis d'Amérique devant la Cour internationale de Justice, observe avec préoccupation la possibilité qu'une éventuelle résolution de la Cour puisse affecter la sécurité du peuple et de l'Etat du Honduras qui dépendent en grande partie des accords bilatéraux et multilatéraux de coopération internationale en vigueur — accords publics et dûment enregistrés au Secrétariat général de l'ONU — si de manière directe et unilatérale on essayait de restreindre ces accords, ce qui aurait pour résultat de laisser mon pays dans une situation sans défense.

Le Gouvernement du Honduras juge aussi, qu'ayant été approuvé à l'unanimité au sein du groupe de Contadora le 9 septembre 1983 le « document d'objectifs » qui comprend la totalité des problèmes que constitue la crise centroaméricaine dans ses diverses manifestations, et que se trouvant en outre en cours les négociations entamées par les cinq pays centroaméricains dans les trois commissions de travail créées à cet effet, il est nécessaire que cette procédure continue sans être perturbée par la soustraction de la matière de sa compétence.

Vu les raisons ci-dessus exposées et vu la demande introduite par le Nicaragua devant la Cour en indication de mesures conservatoires dans la procédure entamée par le Nicaragua contre les Etats-Unis d'Amérique, je prie Votre Excellence de bien vouloir transmettre, avec l'urgence requise par le cas d'espèce, à Monsieur le Greffier de la Cour internationale de Justice, le texte de cette note qui contient les préoccupations du Gouvernement du Honduras sur les effets que ces mesures pourraient avoir sur la négociation en cours ainsi que sur la sécurité internationale de l'Etat du Honduras.

Je saisis cette occasion pour exprimer à Votre Excellence les assurances de ma plus haute considération.

(*Signé*) Arnulfo PINEDA LOPEZ.

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24. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

24 April 1984.

I have the honour to acknowledge receipt of the letter with annexes handed in to the Registry at 7.45 p.m. on Monday 23 April 1984, concerning the proceedings instituted by Nicaragua against the United States of America.

This letter, a copy of which has been transmitted to the Agent of Nicaragua, is under consideration by the Court.

25. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

24 April 1984.

I have the honour to acknowledge receipt of your letter of today's date commenting on the letter received yesterday from the Agent appointed by the United States of America in the proceedings instituted by your Government.

I have transmitted a copy of your letter to the Agent of the United States.

26. THE AMBASSADOR OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

24 April 1984.

I have the honour to refer to the Application of the Republic of Nicaragua of 9 April 1984. On behalf of the Republic of Nicaragua, I wish to inform the Court of the names of the counsel for Nicragua :

[See **I**, *p. 33.]*

27. THE AMBASSADOR OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

24 April 1984.

I have the honour to refer to the Application of the Republic of Nicaragua of 9 April 1984. On behalf of the Republic of Nicaragua I am enclosing two sets of Exhibits I, II, III, IV, V, and VI[1] to which the Republic of Nicaragua will refer in the oral proceedings of 25 April 1984. Please note that Exhibits I and II are Affidavits, the originals of which are included in the materials enclosed herewith. I am having additional copies of Exhibits I-VI produced and will provide them to the Court as soon as possible. I will also provide to the Court as soon as possible Exhibits VII and VIII with sufficient copies thereof.

28. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

24 April 1984.

I have the honour to acknowledge receipt of the letter of 24 April with which you enclosed two sets of Exhibits to which Nicaragua intends to refer at the hearing of 25 April 1984, as also of the two sets themselves, one of which has been transmitted to the Agent of the United States.

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[1] See **I**, pp. 135-213.

29. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA[1]

24 April 1984.

I have the honour to draw your attention to the following provisions of Article 71 of the Rules of Court:

> "1. A verbatim record shall be made by the Registrar of every hearing, in the official language of the Court which has been used . . .
> 4. Copies of the transcript shall be circulated to the judges sitting in the case, and to the parties. The latter may, under the supervision of the Court, correct the transcripts of speeches and statements made on their behalf, but in no case may such corrections affect the sense and bearing thereof . . ."

The transcript of the oral proceedings opening on Wednesday 25 April 1984 will be circulated to the Parties as follows: the transcript of a hearing held from 10 a.m. to 1 p.m. will be available in the evening of the same day, and that of a hearing held from 3 to 6 p.m. will be available during the morning of the following day.

In order to facilitate any supervision which the Court may feel it proper to exercise, I shall be obliged if you will hand your corrections to my secretary as soon as possible after the circulation of each transcript, and in any event not later than 6 p.m. on the day following such circulation.

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30. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

24 April 1984.

I am pleased to provide the Court with the enclosed list of Counsel and others who have assisted the United States in connection with the Application of the Republic of Nicaragua and its Request for the indication of Interim Measures. Arguments shall be presented on behalf of the United States by the Agent, the Deputy Agent and the Special Counsel.

[See **I**, *pp. 33-34.]*

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31. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

24 April 1984.

I have the honor to acknowledge receipt of your letter number 71621 of 24 April 1984 forwarding a letter of the same date from the Agent of Nicaragua together with one copy of Exhibits I to VI. This letter and these documents were received at approximately 9.15 this evening.

We have noted that the Agent of Nicaragua is reportedly having additional copies of Exhibits I to VI prepared, and we are awaiting copies thereof. We have also noted that two further exhibits, numbered VII and VIII are to be provided as soon as possible.

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[1] A communication in the same terms was sent to the Agent of the United States of America.

In view of the short time between receipt of those documents and the scheduled opening of the hearing at 10.00 tomorrow morning, I must reserve my rights for adequate time to study this voluminous documentation and, if necessary, to file rebuttal affidavits and arguments.

32. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

25 April 1984.

I acknowledge receipt of your letter dated 24 April 1984 which was handed to me today on your behalf.

I have transmitted a copy of your letter to the Agent of Nicaragua.

33. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

25 April 1984.

I have the honour to place on record that at 11.40 a.m. today, during the break in the public sitting in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*) I handed to you one copy each of the documents which had then just been deposited by the Agent of Nicaragua in that case, and identified by him as Exhibits VII, VIII, IX, and X[1].

34. THE REGISTRAR TO THE SECRETARY-GENERAL OF THE UNITED NATIONS

25 April 1984.

I have the honour to refer to my telex message of 9 April 1984 (haj 0002-04), by which I informed you of the filing by the Republic of Nicaragua of an Application instituting proceedings against the United States of America (case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*)), and to my letter of 11 April 1984 with which I sent you (*inter alia*) a copy of that Application. I now have the honour to inform you that I am forwarding to you by pouch but under separate cover (marked "Attention Director, General Legal Division") 160 printed copies of that Application.

I would be grateful if, in accordance with Article 40, paragraph 3, of the Statute of the Court, you would be good enough to inform the Members of the United Nations of the filing of this Application.

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[1] See **I**, pp. 214-253.

35. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

25 April 1984.

I have the honour to enclose documents[1] to which the United States proposes to refer during the oral proceedings in the case brought by the Republic of Nicaragua against the United States of America. I have attached the required certification[2]. Please deliver a set of these materials to the Agent of the Republic of Nicaragua at your earliest convenience.

36. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

27 April 1984.

I have the honor to enclose Exhibit IV[3] to which the United States proposes to refer during the oral proceedings in the case brought by the Republic of Nicaragua against the United States of America. I have attached the required certification[4]. Please deliver a set of these materials to the Agent of the Republic of Nicaragua at your earliest convenience.

37. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

27 April 1984.

I have the honour to transmit to Your Excellency herewith a copy of a letter from the Agent of the United States of America, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, dated 27 April 1984 and received in the Registry this morning, together with a copy of the document referred to therein as Exhibit IV.

38. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

27 April 1984.

I have the honor to refer to the official printed text of the Application Instituting the Proceedings[5] filed on 9 April 1984 in the case entered into the Court's General List under number 70. In that printed text, the case is entitled "Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)".

I regret to have to inform you that the United States regards the title given to the case as prejudicial. Accordingly, I have the honour to request that the title be replaced by one that is neutral.

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[1] See **I**, pp. 254-335.
[2] Not reproduced.
[3] See **I**, pp. 336-338.
[4] Not reproduced.
[5] **I**, pp. 3-24.

39. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

28 April 1984.

I have the honour to acknowledge receipt of your letter of 27 April 1984, received in the Registry today, referring to the title of the proceedings instituted by Nicaragua on 9 April 1984, namely the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America).*

On the instructions of the President of the Court, to whom I have submitted your letter, I have first to explain that the titles allotted to cases before the Court, which are purely for purposes of identification, are chosen by the Registrar, with the approval of the President. Such titles are chosen on the basis that they should describe, as neutrally as possible, the nature of the case, which is however necessarily at that stage defined solely by the Application or special agreement.

In your letter you inform me that the United States regards the title set out above as "prejudicial", and requests its replacement by one that is "neutral". You have however not indicated in what specific respect your Government finds the title unsatisfactory from that point of view, or what title would be regarded by your Government as "neutral". If you will be so good as to explain more fully your Government's opinion in this respect, I shall bring the matter further to the attention of the President of the Court.

A copy of your letter and of the present reply is being transmitted for information to the Agent of Nicaragua.

40. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

2 May 1984.

I have the honor to refer to your letter of 28 April regarding the name given to the case brought by Nicaragua against the United States of America.

As you are aware, the United States is of the view that the Court is now in a position to find that a conclusive showing has been made that the Court has no jurisdiction or competence to hear Nicaragua's Application and Request for the indication of interim measures. We took that position both in the letter of 23 April 1984 to the Registrar and in the United States oral presentation to the Court on 27 April 1984.

In keeping with the principle that a "party should not have to give an account of itself on issues of merits before a tribunal which lacks jurisdiction in the matter, or whose jurisdiction has not yet been established" (*Appeal Relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972*, p. 56), the United States has abstained from addressing the allegations of fact contained in Nicaragua's Application and request. As noted on 27 April, the abstention of the United States from addressing those allegations does not in any way constitute an admission of any such allegations and is without prejudice to the rights of the United States. (**I**, p. 115.)

The name assigned to the case appears to suggest that the Court concluded, in advance of any decision with regard to even jurisdictional issues, that military and paramilitary activities have unassailably been undertaken in and against Nicaragua. Thus the name of the case appears to give credence to allegations which are unproven, and the truth of which are not properly the subject of adjudication by the Court because of what the United States believes it has conclusively proven to be the manifest lack of any jurisdiction.

We note that in the past, cases have frequently been named on the basis of geographic location (e.g., *North Sea Continental Shelf* cases, *Aegean Sea Continental Shelf* case, etc.). The United States respectfully suggests that a simple denomination of the parties or of the locale of the controversy, such as "Case Concerning an Application of Nicaragua Against the United States of America" would be a neutral and non-judgmental description of the matter.

41. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

4 May 1984.

I have the honour to acknowledge receipt of your letter of 2 May 1984 concerning the name given to the proceedings instituted by the Republic of Nicaragua against the United States of America, which has been laid before the President of the Court, and a copy transmitted to the Agent of Nicaragua.

42. LE GREFFIER ADJOINT AU CHARGÉ D'AFFAIRES DE L'AMBASSADE DU HONDURAS AUX PAYS-BAS

4 mai 1984.

J'ai l'honneur d'accuser réception de la copie de la note adressée par le Gouvernement du Honduras au Secrétaire général de l'Organisation des Nations Unies pour transmission au Greffier de la Cour, copie que vous avez eu l'obligeance de remettre personnellement.

(*Signé*) Eduardo VALENCIA-OSPINA.

43. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA[1]

7 May 1984.

I have the honour to inform you that the Court will make known its decision on your Government's request for provisional measures in the case concerning *Military and Paramilitary Activities in and against Nicaragua* at a public sitting to be held on Thursday 10 May 1984, at 12 noon.

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[1] A communication in the same terms was sent to the Agent of the United States of America.

44. THE REGISTRAR TO THE SECRETARY-GENERAL OF THE UNITED NATIONS

10 May 1984.

I have the honour, in accordance with Article 41, paragraph 2, of the Statute of the Court, to send you herewith an official copy, for transmission to the Security Council of the United Nations, of an Order of today's date by which the International Court of Justice has indicated provisional measures in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*).

45. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

14 May 1984.

This is to confirm the United States' understanding of the intentions of the Court with respect to the schedule for further proceedings on the Application filed by the Republic of Nicaragua against the United States. The United States understands that the Court intends to establish a schedule whereby Nicaragua would be required to file a memorial within 6 weeks from the date of the Court's indication of provisional measures in this case, and the United States would be provided a further 6 weeks to file a counter-memorial. Although the United States believes a more expedited schedule is justified in the circumstances of this case, it is fully prepared to comply with the wishes of the Court.

It is the further understanding of the United States that the Court will focus during this period on the questions of the jurisdiction of the Court and the admissibility of the Application of the Government of Nicaragua, in accordance with the decision of the Court of May 10, 1984, and that oral proceedings will take place before the end of August of 1984.

46. THE FIRST SECRETARY TO THE AGENT OF THE UNITED STATES OF AMERICA

14 May 1984.

I have the honour to acknowledge receipt with thanks of your letter of today's date concerning the further proceedings in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), and to inform you that by an Order dated 14 May 1984, the President of the Court has fixed the following time-limits, pursuant to paragraph 41 (D) of the Order made by the Court on 10 May 1984, for the written proceedings on the question of the jurisdiction of the Court and the admissibility of the Application in that case:

For the Memorial of the Republic of Nicaragua: 30 June 1984.

For the Counter-Memorial of the United States of America: 17 August 1984.

The subsequent procedure, including the date for the opening of oral proceedings on these questions, is reserved for further decision. I enclose two plain copies of the Order; the official sealed copy will be sent to you shortly.

(*Signed*) C. Poux.

47. THE FIRST SECRETARY TO THE AGENT OF THE REPUBLIC OF NICARAGUA

14 May 1984.

I have the honour to transmit to you herewith for information a copy of a letter, dated 14 May 1984 and received in the Registry today, from the Agent of the United States. In this connection I have the honour further to inform you that by an Order dated 14 May 1984, the President of the Court has fixed the following time-limits, pursuant to paragraph 41 (D) of the Order made by the Court on 10 May 1984, for the written proceedings on the question of the jurisdiction of the Court and the admissibility of the Application in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*:

For the Memorial of the Republic of Nicaragua: 30 June 1984.

For the Counter-Memorial of the United States of America: 17 August 1984.

The subsequent procedure, including the date for the opening of oral proceedings on these questions, is reserved for further decision. I enclose two plain copies of the Order; the official sealed copy will be sent to you shortly.

48. LE GREFFIER AU MINISTRE DES AFFAIRES ÉTRANGÈRES D'AFGHANISTAN[1]

15 mai 1984.

Le 9 avril 1984 a été déposée au Greffe de la Cour internationale de Justice une requête[2] par laquelle la République du Nicaragua a introduit contre les Etats-Unis d'Amérique une instance en l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*.

J'ai l'honneur, à toutes fins utiles, de vous transmettre ci-joint un exemplaire de cette requête.

49. THE DEPUTY-REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

26 June 1984.

I have the honour to acknowledge receipt of the communication dated 25 June 1984 which you handed to the Registrar yesterday, consisting of a "Request of the Republic of Nicaragua concerning Implementation of the Court's Order of 10 May 1984" in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, a "Chronological Account of U.S. 'Covert Activities' in and against Nicaragua since 10 May 1984", a number of attachments thereto (as to which I have of course been in touch with you by telephone to clarify certain points) and an affidavit by the Vice-Minister of the Interior of Nicaragua.

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[1] Une communication analogue a été adressée aux autres Etats admis à ester devant la Cour.

[2] **I**, pp. 1-24.

50. LE GREFFIER AU MINISTRE DES AFFAIRES ETRANGERES D'AFGHANISTAN[1]

28 juin 1984.

Le Greffier de la Cour internationale de Justice a l'honneur de transmettre, sous ce pli, un exemplaire de l'ordonnance rendue par la Cour le 10 mai 1984[2] sur la demande en indication de mesures conservatoires soumise par la République du Nicaragua en l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*.

D'autres exemplaires seront expédiés ultérieurement par la voie ordinaire.

51. THE AMBASSADOR OF NICARAGUA TO THE NETHERLANDS TO THE REGISTRAR

29 June 1984.

I have the honour to transmit herewith copies of attachments Nos. 4 and 12 of our last submission to the Court.

Please note that pages 9 and 10 are not included since these do not refer to the matter in Court as can be verified in the included index of the text. In any case, I have also requested copies of these pages for the Court's perusal and will transmit them to you as soon as possible.

52. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

30 June 1984.

I have the honour to acknowledge receipt in the Registry today of the Memorial of the Republic of Nicaragua on the questions of the jurisdiction of the Court and the admissibility of the Application in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, together with the copies thereof required by Article 52, paragraph 1, of the Rules of Court. I confirm that this pleading was thus filed within the time-limit fixed therefor by the Order made by the President of the Court on 14 May 1984.

The certified copy of the Memorial is being communicated by me to the Agent of the United States of America, pursuant to Article 43, paragraph 4, of the Statute of the Court and the above-mentioned provision of the Rules of Court.

53. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

30 June 1984.

I have the honour to transmit herewith, pursuant to Article 43, paragraph 4, of the Statute of the Court and Article 52, paragraph 1, of the Rules of Court, a certified copy of the Memorial of the Republic of Nicaragua on the questions of the jurisdiction of the Court and of the admissibility of the Application in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), filed in the Registry today, pursuant to paragraph 41 (D) of the Order made by the Court on 10 May 1984 and to the Order made by the President of the Court on 14 May 1984.

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[1] Une communication analogue a été adressée aux autres Etats admis à ester devant la Cour.

[2] *C.I.J. Recueil 1984*, p. 169.

54. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

5 July 1984.

I have the honour to refer to the Memorial of the Republic of Nicaragua on the questions of the jurisdiction of the Court and the admissibility of the Application in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), filed in the Registry on 30 June 1984. As I had the honour to note on that occasion, Annex I, Exhibits B and C are in Spanish, with no translation supplied. In accordance with Article 51, paragraph 3, of the Rules of Court, a translation into English or French should be supplied and certified by the party submitting it as accurate. Also, Annex II, Exhibit D, has been photocopied so that the ends of the lines of print are cut off; it is necessary that the Registry be supplied with complete copies.

May I add that in the text of the Memorial the passages quoted at pages 51, 55-56 and 73-74 appear to be incorrectly transcribed.

55. THE PRESIDENT TO THE AGENT OF THE REPUBLIC OF NICARAGUA

6 July 1984.

On behalf of the Court I wish to acknowledge the receipt of your communication dated 25 June 1984 addressed to the Registrar of the Court and to give the following reply:

1. The Court recalls that in the *Anglo-Iranian Oil Co.* case Britain asked the Security Council to take certain remedial measures against the Iran Oil Company for failure to carry out certain interim measures ordered by the Court. The complaint was not brought to the Court. The Security Council decided that the new request must await the outcome of the proceedings on jurisdiction which were then pending before the Court.

The Court sees no reason to take a different position in regard to your present Request and would suggest that you await the outcome of the pending proceedings on jurisdiction.

2. The Court notes paragraph 9 (c) of your Request concerning the implementation of the Court's Order of 10 May 1984 in which you stated:

> "(*c*) That, until such time as the United States ceases and desists from all activities that do not comply with the Order of 10 May 1984, the facilities of the Court shall not be available to the United States for the purpose of rendering a decision in its favor in any other pending or future case, and the United States shall not be permitted to invoke the Court's aid in any matter."

The Court considers that this somewhat unprecedented request is difficult to contemplate for the following reasons:

(*a*) that the demand "that the facilities of the Court shall not be available to the United States for the purpose of rendering a decision" is fundamentally unacceptable to the Court since it relates to the rendering of a decision in favour of the United States "in any other pending or future case" including, one would suppose, the Chamber proceedings in the *Gulf of Maine* case; including also any other proceedings before the Court, not excluding its present Request itself or the pending jurisdictional issue; also, any future case that the United States might wish to bring to the Court;

(*b*) that the United States "shall not be permitted to invoke the Court's aid in any matter", a request that is considered not only unacceptable but also impermissible in that it unduly restricts the Court in the exercise of its normal function as a court; and

(*c*) that there is no warrant or authority for the request in this paragraph 9 (*c*), in neither the Statute of the Court nor the Rules.

3. As regards paragraph 9 (*a*) and (*b*), although these demands would seem to come within the ambit of the Order of 10 May 1984, it would seem that they might best be taken along with paragraph 10 of your Request in any further stage of the proceedings dealing with the question of merits of the case, including the issue of compensation.

The Court takes the view that the Government of the United States of America is not unaware that the Court naturally expects it to comply with the Order of 10 May 1984 in strict accordance with its terms.

(*Signed*) T. O. ELIAS.

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56. THE AGENT OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

16 July 1984.

I have the honour to refer to the Memorial of the Republic of Nicaragua on the jurisdiction of the Court and the admissibility of the Application in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), filed in the Registry on 30 June 1984. On behalf of the Republic of Nicaragua, I enclose the following items:

1. French translations of the documents attached to Nicaragua's Memorial as Annex I, Exhibits B and C. (The translations are taken from *I.C.J. Pleadings*, case concerning the *Arbitral Award made by the King of Spain on 23 December 1906* (*Honduras* v. *Nicaragua*), Vol. I, pp. 128-129 (Annexes XXIX and XXX to Memorial of Honduras));
2. A complete photocopy of Annex II, Exhibit D to Nicaragua's Memorial; and
3. Corrected copies of pages 51, 55-56 and 73-74 of Nicaragua's Memorial, along with an Errata list concerning these corrections.

57. THE EMBASSY OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

18 July 1984.

Enclosed please find the advance text of a letter to you from Mr. Davis R. Robinson, Agent of the United States of America. The original letter is being transmitted to us and will be sent to you as soon as possible. However, in view of time constraints, we are providing you with this advance copy.

Please feel free to contact me for any further information or assistance.

(Signed) Jamison M. SELBY.

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18 July 1984.

Recent enquiries by the United States in connection with the application by Nicaragua have brought to light a letter sent to the late Judge Manley O. Hudson by the former Registrar of the Court, Mr. Julio Lopez-Oliván, dated 2nd September 1955, Court Registry Nos. 22622/19515, 19512, 19521, and a follow-up letter from the former Deputy-Registrar, Mr. Jean Garnier-Coignet, dated 28th September 1955, Court Registry No. 22724, enclosing a letter from Mr. A. Pelt of the League of Nations Archives to Mr. Oliván dated 14th September 1955.

The United States is considering submitting these letters with its Counter-Memorial on Jurisdiction in the case of *Nicaragua* v. *The United States of America*. However, we have been unable to find a record of the late Judge Hudson's original enquiry to Mr. Olivan which precipitated these letters.

I would be very grateful if you could check the Registry's files for Judge Hudson's initial communication and apprise us of the outcome.

58. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

19 July 1984.

I have the honour to transmit to you herewith a copy of a letter, dated 16 July 1984 and received in the Registry on 17 July 1984, from the Agent of Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, together with copies of the enclosures thereto. With regard to the corrections referred to, to be made to pages 51, 55-56 and 73-74 of the Memorial filed by Nicaragua on 30 June 1984, I have the honour to inform you that the President of the Court has given leave, under Article 52, paragraph 4, of the Rules of Court, for these corrections to be made.

59. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

20 July 1984.

I have the honour to acknowledge receipt of Your Excellency's letter of 16 July 1984, with its enclosures. So far as concerns the corrections to pages 51, 55-56 and 73-74 of the Memorial filed on 30 June 1984, the President of the Court has given leave, pursuant to Article 52, paragraph 4, of the Rules of Court, for those corrections to be made.

With regard to the translations into French of the documents annexed to the Memorial (Annex 1, Exhibits B and C), although I note that these are the translations filed by Honduras in the case concerning the *Arbitral Award made by the King of Spain on 23 December 1906* (reproduced in the Court's Pleadings volumes for that case), I should, however, observe that we are here in the presence of a different case and under Article 51, paragraph 3, of the Rules of Court, a translation of a document annexed to a pleading in a case is required to be certified as accurate by the party submitting it. I should, therefore, be obliged if the translations into French in question were to be certified as accurate by yourself as Agent.

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60. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

25 July 1984.

I have the honour to acknowledge receipt of your letter dated 18 July 1984, a copy of which you have transmitted directly to the Agent of Nicaragua, stating that in relation to the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* the United States of America is considering submitting with its Counter-Memorial on jurisdiction two letters sent to the late Judge Manley O. Hudson respectively by the former Registrar and Deputy-Registrar of the Court, Mr. López-Oliván and Mr. Garnier-Coignet. Those letters, dated respectively 2 and 28 September 1955, you have identified by their Court Registry numbers. Having learned of them, you ask me to check the Registry's files for Judge Hudson's initial communication and to apprise you of the outcome.

As you must be aware, the texts of the letters in question cannot have been made available by the Registry of the Court, since it is a policy to which we adhere most strictly that correspondence with individuals — including of course that between the Registry and current or former Members of the Court — is not made public; also access to the files preserving it is restricted and, even within the Court, subject to absolute confidentiality. The coming to light, through a source other than the Registry, of certain letters addressed to individuals does not constitute in itself a circumstance allowing me to depart from the Registry's consistent policy just described, a policy whose underlying principle is the protection of both the Court and correspondents. Furthermore, the correspondence in question does not in any way form part of the documentation or correspondence which the Registry is bound to publish pursuant either to the Statute of the Court or to the Rules of Court.

In the light of the above, and after having given your letter the most careful consideration, I have regretfully to inform you that I am in no position to accede to your request.

I am transmitting to the Agent of Nicaragua a copy of this reply.

61. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA[1]

1 August 1984.

In connection with the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* I have the honour, on instructions from the President, to inform you that the Agents of both parties will be received by the President in his Chambers on 29 August 1984 at 11 a.m. in order to ascertain their views with regard to the subsequent procedure and, in particular, the date for the opening of the oral proceedings on the questions of the jurisdiction of the Court and the admissibility of the Application.

62. THE AGENT OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

3 August 1984.

I have the honour to inform you that the Republic of Nicaragua proposes to exercise the power conferred by Article 31 of the Statute of the Court to choose a judge *ad hoc* in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.

The name of the Judge *ad hoc* proposed by the Republic of Nicaragua is Professor Claude-Albert Colliard of French nationality. I enclose brief biographical details[2] of Professor Colliard.

63. THE AGENT OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

3 August 1984.

I have the honour to refer to your letter of July 20, 1984 in which you request that I certify as accurate the translation of certain documents.

Therefore, I hereby certify, as Agent of the Republic of Nicaragua, that the translations into French of the documents annexed to the Memorial (Annex 1, Exhibits B and C) are accurate.

64. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

3 August 1984.

I have the honour to acknowledge receipt of two letters of today's date which Your Excellency has handed to me and of which one notifies your Government's choice of Professor Claude-Albert Colliard to sit as judge *ad hoc* in the case concerning *Military and Paramilitary Activities in and against Nicaragua*

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[1] A communication in the same terms was sent to the Agent of the United States of America.

[2] Not reproduced.

(*Nicaragua* v. *United States of America*) and is accompanied by his succinct biography, while the other constitutes a requested certification of the translation of certain documents annexed to the Memorial of Nicaragua on the questions of jurisdiction and admissibility. I am transmitting copies of both these letters to the Agent of the United States of America.

In regard to the first-mentioned, the agent of the United States has been informed that any observations that his Government may wish to make should be communicated by 20 August 1984.

65. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

3 August 1984.

I have the honour to transmit to you herewith copies of two letters of today's date which have been handed to me by the Agent of Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*).

With the first of these letters the Agent of Nicaragua enclosed a succinct biography of the person chosen by Nicaragua to sit as a judge *ad hoc* in the case, and I likewise send you herewith a copy of that enclosure. In that connection I am to inform you that the Vice-President of the Court, in the exercise of his powers under Article 13, paragraph 3, of the Rules of Court, has fixed 20 August 1984 as the time-limit within which your Government may furnish such observations as it may wish to make pursuant to Article 35, paragraph 3, of the Rules of Court.

66. THE REGISTRAR TO THE AGENT OF EL SALVADOR

15 August 1984.

I have the honour to acknowledge receipt of the document entitled "Intervention Pursuant to Article 63 of the Statute of the International Court of Justice. Case concerning Military and Paramilitary Activities in and Against Nicaragua. Declaration of Intervention of the Republic of El Salvador"[1] which you filed with me today.

I wish also to acknowledge receipt of the document from the President of the Republic of El Salvador whereby you are designated as Agent of El Salvador in the case, together with the affidavit signed by the Acting Minister of Foreign Affairs of the Republic of El Salvador, which you also deposited with me.

67. THE DEPUTY-REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA[2]

15 August 1984.

I have the honour to transmit herewith to Your Excellency a certified copy of a document dated 15 August 1984 and entitled "Intervention Pursuant to

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[1] **II**, pp. 451-459.

[2] A communication in the same terms was sent to the Agent of the Republic of Nicaragua.

Article 63 of the Statute of the International Court of Justice. Case concerning Military and Paramilitary Activities in and Against Nicaragua. Declaration of Intervention of the Republic of El Salvador."

The document is signed by Ambassador Ivo P. Alvarenga who is appointed Agent of the Republic of El Salvador before the International Court of Justice by the President of the Republic of El Salvador.

I am also sending to you a certified copy of an affidavit signed by the Acting Minister of Foreign Affairs of the Republic of El Salvador, which was filed with the above-mentioned declaration.

I have in addition to inform you that, in exercise of his functions under Article 13, paragraph 3, of the Rules of Court, the Vice-President of the Court has fixed Friday 14 September 1984 as the time-limit for the filing by your Government of written observations on the above-mentioned declaration filed by the Government of El Salvador, as provided in Article 83, paragraph 1, of the Rules of Court.

68. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

17 August 1984.

In accordance with the Order of 14 May 1984 issued by the President of the Court relating to the 9 April 1984 Application of Nicaragua against the United States of America, the United States is filing with you today the duly signed original of the United States Counter-Memorial on the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of Nicaragua's Application, together with duly certified Annexes, in three parts. In addition, the Counter-Memorial and its Annexes are accompanied by a certified copy for communication to the Agent of Nicaragua. We are also submitting fifty copies of the Counter-Memorial and Annexes to meet the immediate requirements of the Court, as agreed with the Registry. As stated in our letter to you of 22 July 1984, the United States will submit 125 printed copies of the Counter-Memorial and Annexes as soon as possible [1].

The United States is also depositing today copies of the whole documents which have been referred to in the Counter-Memorial and Annexes. A list is enclosed. Copies of these documents are being provided to the Agent of Nicaragua as well.

69. THE FIRST SECRETARY TO THE AGENT OF THE REPUBLIC OF NICARAGUA

17 August 1984.

I have the honour to transmit herewith, pursuant to Article 43, paragraph 4, of the Statute of the Court and Article 52, paragraph 1, of the Rules of Court, a certified copy of the Counter-Memorial of the United States of America (together with three volumes of annexes) on the questions of the jurisdiction of the Court and of the admissibility of the Application in the case concerning

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[1] **II**, pp. 1-447.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. *United States of America)*, filed in the Registry today, pursuant to paragraph 41 (D) of the Order made by the Court on 10 May 1984 and to the Order made by the President of the Court on 14 May 1984.

70. THE DEPUTY-REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

20 August 1984.

I have the honour to acknowledge receipt in the Registry of the Counter-Memorial of the United States of America filed with the Registry on 17 August 1984 on the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of Nicaragua's application, together with duly certified Annexes, in three parts, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, as well as of the copies thereof required under Article 52, paragraph 1, of the Rules of Court. I confirm that this pleading was thus filed within the time-limit fixed therefor by the Order made by the President of the Court on 14 May 1984 pursuant to paragraph 41D of the Order made by the Court on 10 May 1984.

The certified copy of the Counter-Memorial and its Annexes was communicated on 17 August 1984 to the Agent of Nicaragua, pursuant to Article 43, paragraph 4, of the Statute of the Court and the above-mentioned provision of the Rules of Court. Note has been taken that the United States of America will submit one hundred and twenty-five printed copies of the Counter-Memorial and Annexes as soon as possible.

I have likewise the honour to acknowledge receipt of one set of copies of the whole documents which have been referred to in the Counter-Memorial and Annexes. The Court and the Agent of Nicaragua are being informed that these documents are available to be consulted in the Library of the Court.

71. THE COUNSELOR OF THE EMBASSY OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

7 September 1984.

Mr. Davis Robinson, Agent of the United States, has asked me to deliver the enclosed letter. A signed original will follow shortly.

(*Signed*) John R. CROOK.

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7 September 1984.

I have the honor to refer to the meeting on 29 August 1984 of the President of the Court with the Agents of the United States and Nicaragua, and specifically to the discussion at that meeting concerning the question of the necessity of further written pleadings by the Parties on the question of the jurisdiction of the Court and the admissibility of the Nicaraguan application of 9 April 1984.

During the 29 August meeting, the Agent of Nicaragua stated that, from a "professional point of view", he considered an additional round of written pleadings on the issues of jurisdiction and admissibility to be "preferable". He indicated that nevertheless Nicaragua was not requesting additional written pleadings due to its perceived interest in the scheduling of an early oral hearing. I stated that the United States shared Nicaragua's desire to proceed expeditiously. I also indicated, however, that the United States considered an additional round of written pleadings to be a necessary prerequisite to a fair and orderly judicial process in this phase of the case. I set forth in detail the factors which had led the United States to this conclusion. I respectfully suggested that the Court, in accordance with Article 43 (2) of the Statute and Article 45 (2) of the Rules, might in view of these considerations determine *proprio motu* that a further round of written pleadings was necessary. I also described how the necessity for additional written pleadings could be accommodated with the Parties' mutual desire for expedition.

The President of the Court, as I understood him, observed that a majority of the Members of the Court were already of the view that additional written proceedings were not necessary on the Court's own motion. The President referred, however, to the right of the United States under Article 45 (2) of the Rules of Court to request further written pleadings.

In the view of the United States, notwithstanding the common interest of both Parties in expedition, further written pleadings are now necessary. Further investigation and research since the oral proceeding in April have revealed a substantial quantity of new evidence as presented by the United States in its Counter-Memorial of 17 August 1984. This new material and the accompanying elaboration of legal argument are relevant to major issues before the Court. The Nicaraguan Memorial of 30 June 1984 did not address or foresee this new factual and legal argumentation. For example, the United States has introduced important new evidence demonstrating that responsible Nicaraguan officials in the 1950s specifically advised the United States that Nicaragua had not accepted the compulsory jurisdiction of this Court. Should Nicaragua wish to contest this evidence by documents available to it, Article 43 (2) of the Statute clearly contemplates that such a contingency shall normally occur as part of the written proceedings.

In the view of the United States, it is not accurate to state, as did the Agent for Nicaragua in the 29 August 1984 meeting, that any failure adequately to develop evidence and arguments in the written proceedings disadvantages only Nicaragua. Summary proceedings may damage the interest of either Party. It is a fundamental principle of all legal systems that evidence must be submitted in support of factual assertions. As we understand Article 43 (2) of the Statute and Article 56 of the Rules, further written pleadings would seem required if Nicaragua intends to present any documentary rebuttal to the new evidence and argumentation presented by the United States in its Counter-Memorial. If Nicaragua does not do so in a reply, then certain United States evidence would stand unrebutted, considerably reducing the complexity of the oral proceedings and the required preparation for them.

Furthermore, the United States cannot fail to point out that in a letter dated 23 April 1984 in advance of the oral proceedings on Nicaragua's request for provisional measures and in the April oral proceedings themselves, the United States raised as a fundamental plea in bar Nicaragua's failure to accede to the compulsory jurisdiction of the Court. When the United States noted that it did not appear that Nicaragua had ever ratified the Protocol of Signature to the Statute of the Permanent Court and that Nicaragua did not qualify under Article 36 of this Court's Statute, the Agent for Nicaragua assured the Court in a letter dated 24 April 1984 that that Protocol of Signature had been "ratified in due course" by Nicaragua. At the oral proceedings on 27 April 1984, the Agent for Nicaragua suggested that the Instrument of Ratification may have been sent to the League of Nations for deposit:

> "It was the year 1939: the start of the Second World War. There are quite obvious reasons why this ratification may not have reached Geneva at the time . . ." (**I**, p. 119.)

Given the summary nature of the April proceedings, the United States was unable to present a full case on this fundamental and unprecedented jurisdictional issue. Importantly, the Court's Order of 10 May 1984 was on the basis of a record containing these Nicaraguan assurances as to significant facts. See, e.g., Order of 10 May, paragraphs 14 and 19.

In its Memorial of 30 June 1984, however, Nicaragua confirmed that it had never even attempted to deposit the Instrument of Ratification to the Protocol of Signature and hence had never ratified the Protocol of Signature under International Law at all. See, e.g., Nicaraguan Memorial of 30 June 1984, paragraphs 6 and 13 and Annex I, page 1. (As discussed in the United States Counter-Memorial of 17 August at paragraph 48 and the notes thereto, it appears that Nicaragua never completed the ratification process even under its own internal law, contrary to what the Nicaraguan Agent asserted during the April oral proceedings. See **I**, p. 118.)

The record which was before the Court as it formulated its order of 10 May was thus materially inaccurate and incomplete. While this may be explained by the purported urgency of the Nicaraguan request for indication of interim measures and the provisional nature of the findings made in connection therewith, there is no justification for any comparable situation arising at this phase of the case.

As I indicated at the 29 August meeting, a further round of written pleadings need not in our view cause significant delay. Indeed, additional written proceedings could permit a more expeditious and well-structured oral hearing. The United States recalls that the Court has in the past been concerned lest gaps in the parties' written proceedings lead to an unnecessary and otherwise avoidable protraction of the oral proceedings (e.g., see *Fisheries*, Order of 10 January 1951, *I.C.J. Reports 1951*, at p. 9). A further round of written pleadings on the questions of jurisdiction and admissibility could narrow the issues to be addressed at oral argument and thereby permit the Court to render a decision on the basis of a more coherent record. Omission of further written pleadings could result in protraction and interruption of the oral hearing. Such interruption could derive from fundamental considerations of fairness as embodied, for example, in Article 56 (3) of the Rules of Court.

For the foregoing reasons, the United States respectfully submits that a further round of written pleadings on the questions of jurisdiction and admissibility is necessary. To that end, the United States has the honor to request, pursuant to Article 43 (2) of the Statute and Article 45 (2) of the Rules, that the Court direct that there shall be a Reply by the Applicant and a Rejoinder by the Respondent.

72. THE AMBASSADOR OF THE REPUBLIC OF EL SALVADOR TO THE REGISTRAR

10 September 1984.

[See **II**, *pp. 461-462.]*

73. THE AGENT OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

10 September 1984.

[See **II**, *pp. 465-466.]*

74. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA[1]

10 September 1984.

I have the honour to transmit herewith a copy of a letter of today's date which I have just received from the Agent of El Salvador with reference to his Government's declaration of intervention in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.

75. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

11 September 1984.

I refer to my letter of 10 September 1984, with which I transmitted to you a copy of a letter dated 7 September 1984 from the Agent of the United States, submitting to the Court certain views of his Government in regard to the procedure to be followed in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. I now have the honour to transmit to Your Excellency herewith a copy of a letter which I have today, on the President's instructions, addressed to the United States Agent in that respect.

76. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

11 September 1984.

I have the honour to acknowledge receipt of your letter dated 7 September 1984, and transmitted to the Registry via the United States Embassy in The Hague on that day, whereby the United States requests, pursuant to Article 43, paragraph 2, of the Statute and Article 45, paragraph 2, of the Rules of Court, that the Court direct that there be a Reply by the Applicant and a Rejoinder by the Respondent on the questions of jurisdiction and admissibility in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.

That request, and the contentions in your letter in support thereof, have now been considered by the Members of the Court, and I am directed by the President to inform you that the Court has decided that such further pleadings are not necessary, and that accordingly it should not exercise its power under Article 45, paragraph 2, of the Rules of Court to authorize or direct that they be filed. A date will therefore shortly be fixed for public hearings on the question of which the Court is at present seised.

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[1] A communication in the same terms was sent to the Agent of the United States of America.

May I also take this opportunity to correct a misunderstanding which appears to have arisen at the meeting between the President of the Court and the Agents of the Parties held on 29 August 1984. In the course of the discussion, the President expressed his own opinion of the view which might be taken by the Members of the Court on the question of a further exchange of pleadings; he did not state the existence of any such view as a fact, nor could he have done so, inasmuch as the Court had not yet had occasion to consider the matter. Since the third paragraph of your letter embodies a misapprehension on this point, I think it is well to make the position clear.

77. THE REGISTRAR TO THE AGENT OF EL SALVADOR

12 September 1984.

I have the honour to acknowledge receipt of the letter dated 10 September 1984 which Your Excellency handed to me on that date, concerning the declaration of intervention of the Republic of El Salvador, and to confirm that copies of that communication have been transmitted to the Members of the Court and to the Parties in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*.

78. LE GREFFIER AU MINISTRE DES AFFAIRES ÉTRANGÈRES DE L'AFGHANISTAN[1]

14 septembre 1984.

L'article 83, paragraphe 2, du Règlement de la Cour internationale de Justice prévoit que le Greffier de la Cour transmet copie de toute déclaration tendant à intervenir dans une affaire à tous les Etats admis à ester devant la Cour.

En conséquence j'ai l'honneur de vous transmettre ci-joint un exemplaire du texte imprimé bilingue, établi par le Greffe, d'une déclaration d'intervention en l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)* déposée le 15 août 1984 par la République d'El Salvador sur la base de l'article 63 du Statut de la Cour.

79. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

14 September 1984.

I have the honor to refer to the meeting that took place on 29 August between the President of the Court and the Agents of the United States and Nicaragua.

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[1] Une communication analogue a été adressée aux autres Etats admis à ester devant la Cour.

and in particular to the discussion at that meeting concerning the scheduling of further proceedings on the questions of jurisdiction and admissibility. I also have the honor to refer to your letter of 11 September concerning the Court's denial of the United States request of 7 September for further written pleadings under Article 43 (2) of the Statute and Article 45 (2) of the Rules of Court, in which you advise that a date "will therefore shortly be fixed for public hearings on the question of which the Court is at present seised".

During the course of the 29 August meeting, called under Article 31 of the Rules of Court, the President of the Court suggested 1 October 1984 as a possible date for an oral hearing on the admissibility of El Salvador's intervention under Article 63 of the Statute of the Court, with commencement of oral proceedings between the United States and Nicaragua on the issues of jurisdiction and admissibility to follow thereafter on 4 October. The President of the Court acknowledged that, in the event that the Salvadoran intervention as of right was admitted, the suggested 4 October date would have to be reconsidered. At that time the Agent of the United States noted his lack of instructions with regard to the suggested schedule.

For the reasons set forth in the written observations of the United States on the question of El Salvador's intervention as of right under Article 63 of the Statute of the Court, submitted this day to the Court, the United States is of the view that the Salvadoran intervention is clearly admissible. Consequently, the United States has offered no objection to that intervention. For like reasons, it is the United States view that, so long as it is consistent with the views of El Salvador and Nicaragua, 1 October would be an appropriate date for an oral hearing on the admissibility of the Salvadoran intervention.

In light of the apparent admissibility of the Salvadoran intervention as of right, however, the United States cannot see how oral proceedings on the questions of the jurisdiction of the Court and the admissibility of the Nicaraguan Application could be fixed to begin on 4 October. Article 86 of the Rules of Court provides that a State whose intervention as of right under Article 63 of the Statute is admitted "shall be furnished with copies of the pleadings" of the Parties to the case, and shall be entitled to submit written observations on the subject matter of its intervention "within a time-limit to be fixed . . .". In his letter of 10 September, the Agent of El Salvador requested a reasonable period of time in which to review the pleadings in order to determine how they bear on El Salvador's construction of the various conventions the meaning of whose provisions are at issue at this phase of the case.

The United States respectfully submits that consideration of the scheduling of further proceedings on the questions of the jurisdiction of the Court and the admissibility of the Nicaraguan Application should be deferred until after such time as a determination has been reached by the Court on the admissibility of the Salvadoran intervention as of right. The Agent of the United States stands ready to meet with the President of the Court and the Agents of Nicaragua and El Salvador at any appropriate time to discuss further the question of the schedule of proceedings in this case.

80. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

14 September 1984.

[See **II**, *pp. 467-471.]*

81. THE DEPUTY-REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

15 September 1984.

I have the honour to refer to Your Excellency's letter of 3 August 1984, notifying the Court of the intention of the Government of Nicaragua to choose M. Claude-Albert Colliard as judge *ad hoc* to sit in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, and to inform you that no observation on this nomination has been received from the Agent of the United States of America. I have further to inform you, pursuant to Article 35, paragraph 3, of the Rules of Court, that no objection to the appointment appears to the Court itself.

M. Colliard is therefore being informed accordingly and supplied with copies of the existing documents in the case. Subsequent case documentation will be furnished to him *pari passu* with the Members of the Court.

The Agent of the United States is also being informed.[1]

82. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA[2]

15 September 1984.

Further to the Registrar's letter of 11 September 1984 concerning the procedure in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, I have the honour to inform you that the President of the Court, in the exercise of his powers under Article 54 of the Rules of Court, has fixed Monday 8 October 1984, at 3 p.m., for the opening of the oral proceedings on the questions of jurisdiction and admissibility in this case. Any decision that the Court might take in connection with the Declaration of Intervention made by El Salvador pursuant to Article 63 of the Statute will be communicated to the Agents of the Parties and to the Agent of El Salvador prior to Monday 8 October 1984.

83. THE DEPUTY-REGISTRAR TO THE AGENT OF EL SALVADOR

15 September 1984.

I have the honour to inform Your Excellency that in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, any decision that the Court might take in connection with the Declaration of Intervention made by Your Excellency's Government pursuant to Article 63 of the Statute will be communicated to Your Excellency and to the Agents of the Parties prior to Monday 8 October 1984, the date fixed by the President of the Court, in the exercise of his powers under Article 54 of the Rules of Court, for the opening of the oral proceedings on the questions of jurisdiction and admissibility in that case.

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[1] A communication in the same terms was sent to the Agent of the United States of America.

[2] A communication in the same terms was sent to the Agent of the Republic of Nicaragua.

84. THE DEPUTY-REGISTRAR TO THE AGENT OF EL SALVADOR

15 September 1984.

Following the expiration of the time-limit fixed on 14 September 1984 for the observations of the Parties on the Declaration of Intervention submitted by Your Excellency's Government on 15 August 1984 in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, I have the honour to transmit to Your Excellency herewith copies of letters from the Agents of Nicaragua and the United States of America containing the observations of their respective Governments on the Declaration of Intervention of Your Excellency's Government[1].

85. THE AMBASSADOR OF EL SALVADOR TO THE REGISTRAR

Rome, 17 September 1984.

[See **II**, *pp. 472-473.]*

86. THE DEPUTY-REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

21 September 1984.

I have the honour to transmit to you herewith a copy of a letter dated 17 September 1984 and received late today from the Agent of El Salvador in relation to the written observations submitted by Nicaragua on his Government's declaration of intervention in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*.

Copies of that letter have been transmitted to the Members of the Court and to the Agent of the United States of America.

87. THE AMBASSADOR OF EL SALVADOR TO THE REGISTRAR

(Telex)

24 September 1984.

I have the honor to refer to the declaration of intervention of my Government currently under advisement by the Court. You have informed El Salvador that any decision the Court might take in connection with the declaration of intervention will be communicated to the Agents of the Parties and to the Agent of El Salvador prior to Monday, 8 October 1984. You also have informed El Salvador that the President of the Court has fixed Monday, 8 October for the opening of the oral proceedings on the questions of jurisdiction and admissibility in this case.

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[1] See Nos. 73 and 80, *supra*.

1. That date is only two weeks away. No matter when El Salvador's intervention is recorded by the Court — but particularly if that occurs on the eve of the proceedings — it would be difficult in the extreme for El Salvador adequately to prepare. First, El Salvador will need time to analyse the pleadings and annexed documents when intervention is recorded. Second, my country desires a reasonable time within which to submit written observations on the subject matter of the intervention. Finally, El Salvador will need more time than will be possible under the Court's schedule to prepare adequately to present oral statements for the 8 October proceedings.

2. I therefore respectfully request a postponement of the opening of oral proceedings on the jurisdiction and admissibility questions for a reasonable time after El Salvador's receipt of the pleadings.

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88. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

28 September 1984.

I have the honor to refer to your letter of 15 September concerning the opening of the oral proceedings on the questions of jurisdiction and admissibility in the case of *Nicaragua* v. *United States of America*.

Article 53 (2) of the Rules of Court provides:

> "The Court may, after ascertaining the views of the parties, decide that copies of the pleadings and documents annexed shall be made accessible to the public on or after the opening of the oral proceedings."

In this connection, it is the view of the United States that it would be appropriate and consistent with Article 53 (2) for the Court to decide that copies of the pleadings and documents thus far submitted in the present case be made accessible to the public as of the opening of the oral proceedings currently scheduled to begin on October 8, 1984. The United States respectfully requests that the Court so decide.

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89. THE COUNSELOR FOR LEGAL AFFAIRS OF THE EMBASSY OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

2 October 1984.

I have been authorized and instructed by Mr. Davis Robinson, Agent of the United States of America, to transmit to you the enclosed letter from Mr. Robinson. The duplicate original signed by Mr. Robinson will be transmitted as soon as it is received.

2 October 1984.

I have the honor to refer to the case between Nicaragua and the United States now pending before the Court.

Please be advised that the United States has designated as a Deputy Agent in the case Mr. Patrick M. Norton, Assistant Legal Adviser at the United States Department of State.

90. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA [1]

5 October 1984.

I have the honour to refer to your letter of 28 September 1984 by which the Government of the United States of America requested the Court to decide that copies of the pleadings and documents so far submitted in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*) be made accessible to the public as of the opening of the oral proceedings on 8 October 1984.

Taking into account your Government's request and in conformity with its practice, the Court has decided, pursuant to Article 53, paragraph 2, of the Rules of Court, to make the pleadings and annexed documents in the case accessible to the public with effect from 8 October 1984.

91. THE REGISTRAR TO THE AGENT OF EL SALVADOR [2]

5 October 1984.

I have the honour, with reference to the Declaration of Intervention of the Government of the Republic of El Salvador in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*) to confirm that the Court on 4 October 1984 made an Order in this connection and to enclose an official copy thereof, which does not include the individual opinions filed by some Members. A certified true copy of the Order, together with those opinions, will be transmitted to Your Excellency subsequently.

92. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

5 October 1984.

I have the honour to acknowledge receipt of a set of copies of documents delivered by Your Excellency to the Registry today. I await the submission of the certified copies thereof, as provided for in Article 56, paragraph 1, of the Rules of Court, in order to consider them as having been duly filed in the Registry.

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[1] A communication in the same terms was sent to the Agent of the Republic of Nicaragua.

[2] A communication in the same terms was sent to the Agent of the United States of America and to the Agent of the Republic of Nicaragua.

As mentioned at the meeting held this afternoon between the President and the Agents of the Parties, I am transmitting a copy of the set to the Agent of the United States of America in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*.

93. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

5 October 1984.

As mentioned at the meeting held this afternoon between the President and the Agents of the Parties in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, I have the honour to enclose herewith a set of copies of documents supplied by the Agent of Nicaragua and delivered this evening.

I am calling to the attention of the Agent of Nicaragua the requirement of certified copies of the documents concerned as provided for in Article 56 of the Rules of Court.

94. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

6 October 1984.

I am pleased to provide the Court with the enclosed list of Counsel and others who are assisting the United States in connection with the questions of jurisdiction and admissibility in the case of *Nicaragua* v. *United States of America*. During the oral proceedings on these questions, argument will be presented on behalf of the United States by the Agent and some or all of the Deputy Agents and Counsel.

[See **III**, *pp. 3-4.]*

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95. THE AGENT OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

8 October 1984.

I have the honour to transmit herewith a certification of the set of documents submitted to the Registry on 5 October 1984, pursuant to Article 56, paragraph 1, of the Rules of Court. An additional document, "Exhibit F", is also included, as a matter of convenience for the Court. As it is part of a readily available public document, it need not be submitted to the other party for consent or to the Court for approval under Article 56.

Twenty additional copies of Nicaragua's Exhibits are also hereby submitted.

96. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

8 October 1984.

I have the honor to refer to your letter received during the evening of 5 October 1984, enclosing a list and copies of exhibits (new documents) that Nicaragua proposes to submit during the oral proceedings on jurisdiction and admissibility commencing on 8 October 1984.

Despite the brief time allowed at this juncture to review these new documents, the United States will not object to their submission under Article 56 of the Rules of Court, while at the same time reserving its position as to their relevance, probity and the accuracy of any translation provided. As noted in your letter of 5 October, we await the receipt of certified copies, presumably in advance of any use of these new documents by Nicaragua in the oral proceedings. Further, the United States is unable to identify certain of these documents (e.g., to whom was the legal opinion of Suzanne Bastid dated 3 August 1956 addressed and where was it located) and in other cases only excerpts from documents are provided (e.g., the legal opinion of Charles Rousseau dated 21 June 1956). The United States assumes that the Court will assure proper identification of all these new documents in advance of their submission as well as the deposit of the whole documents as required under Article 50 of the Rules of Court.

The United States lack of objection to the submission of the new documents is of course subject to the reservation of its rights under Article 56 (3) of the Rules of Court to comment upon these new documents, and to submit documents in support of its comments, either during or after the oral proceedings on jurisdiction and admissibility. Furthermore, the United States will determine following the conclusion of the first round of Nicaragua's oral argument whether the United States will seek to submit any other new documents under the terms of Article 56 of the Rules.

97. LE GREFFIER AU MINISTRE DES AFFAIRES ÉTRANGÈRES DES PAYS-BAS

8 octobre 1984.

Me référant au paragraphe V des principes généraux de l'accord du 26 juin 1946 entre le Gouvernement des Pays-Bas et la Cour internationale de Justice, j'ai l'honneur de porter à votre connaissance que, à l'audience qui se tiendra le 8 octobre 1984 en l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*, le Nicaragua sera représenté comme suit :

[Voir **III**, *p. 3.]*

98. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA [1]

8 October 1984.

I have the honour to draw your attention to the following provisions of Article 71 of the Rules of Court :

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[1] A communication in the same terms was sent to the Agent of the United States of America.

> "1. A verbatim record shall be made by the Registrar of every hearing, in the official language of the Court which has been used . . .
>
> 4. Copies of the transcript shall be circulated to the judges sitting in the case, and to the parties. The latter may, under the supervision of the Court, correct the transcripts of speeches and statements made on their behalf, but in no case may such corrections affect the sense and bearing thereof . . ."

The transcript of the oral proceedings opening on Monday, 8 October 1984, will be circulated to the Parties as follows: the transcript of a hearing held from 10 a.m. to 1 p.m. will be available in the evening of the same day, and that of a hearing held from 3 to 6 p.m. will be available during the morning of the following day.

In order to facilitate any supervision which the Court may feel it proper to exercise, I shall be obliged if you will hand your corrections to my secretary as soon as possible after the circulation of each transcript, and in any event not later than 6 p.m. on the day following such circulation.

99. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA[1]

9 October 1984.

Further to my letter of 5 October 1984, I have the honour to transmit to you herewith the official sealed copy of the Order made by the Court on 4 October 1984 concerning the Declaration of Intervention of the Government of the Republic of El Salvador in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*.

100. THE REGISTRAR TO THE AGENT OF EL SALVADOR

9 October 1984.

With reference to the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* and further to my letter of 28 September 1984, I have the honour to inform Your Excellency that the Court has now decided to make the pleadings and annexed documents available and accessible to the public in accordance with Article 53 of the Rules.

A set of the pleadings and annexes concerned is accordingly being sent to you forthwith in order to satisfy the request presented by Your Excellency's Government on 10 September 1984.

101. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

13 October 1984.

I have the honor to refer to my letter of 8 October 1984 regarding, *inter alia*, the submission of new documents by the United States under the terms of Article 56 of the Rules of Court. The United States hereby submits certified[1] copies of such documents, as notified on the list attached to this letter.

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[1] A communication in the same terms was sent to the Agent of El Salvador and to the Agent of the United States of America.

In addition the United States will also be referring to other documents that are part of a readily available publication within the meaning of paragraph 4 of Article 56 of the Rules. For the convenience of the Court, however, we are submitting herewith copies of certain of such documents.

LIST OF DOCUMENTS SUBMITTED BY THE UNITED STATES PURSUANT TO ARTICLE 56 OF THE RULES OF COURT

1. September 7, 1984 Draft "Contadora Act for Peace and Cooperation in Central America (Revised)". Unofficial English Translation of Spanish Original.
2. Joint Communiqué of the Ministerial Meeting of San José, Costa Rica, September 29, 1984, as contained in cable San José 7633.
3. "Exposicion del Señor Ministro de Relaciones Exteriores al Honorable Congreso Nacional pidiendo la aprobacion de la Carta de las Naciones Unidas, el Estatuto de la Corte Internacional de Justicia y los Acuerdos Provisionales Concertados por los Gobiernos Participantes en la Conferencia de las Naciones Unidas sobre Organizacion Internacional (Managua, D.N., 2 de Julio de 1945)", in Republica de Nicaragua, *Memoria Presentada al Honorable Congreso Nacional Por el Secretario de Estado en el Despacho de Relaciones Exteriores, 1945.*

   ("Statement of the Minister of Foreign Relations to the National Congress requesting the approval of the United Nations Charter, the Statute of the International Court of Justice, and the provisional agreements concluded by the governmments participating in the United Nations Conference on International Organization" (Managua, July 2, 1945) in Republic of Nicaragua, *Memorial Presented to the National Congress by the Secretary of State in the Office of Foreign Relations, 1945.* (English translation of pp. 139-142 provided.)
4. Letter from Manley O. Hudson to Esteban Mendoza, dated 14 November 1955.
5. Letter from Manley O. Hudson to Esteban Mendoza of 16 December 1955 with attached Aide-Mémoire.
6. Letter from Manley O. Hudson to Esteban Mendoza of 20 December 1955 (without attachment).
7. Letter from Manley O. Hudson to Esteban Mendoza of 16 January 1956.
8. Letter from Esteban Mendoza to Manley O. Hudson of 10 February 1956 (Spanish with English translation of 11 February 1956).
9. Letter from Manley O. Hudson to Esteban Mendoza of 17 February 1956.
10. Letter from Esteban Mendoza to Manley O. Hudson of 2 May 1956 (Spanish and English).
11. Letter from Manley O. Hudson to Esteban Mendoza of 7 May 1956.
12. Letter from Esteban Mendoza to Manley O. Hudson of 26 May 1956 (Spanish and English).
13. Letter from Manley O. Hudson to Esteban Mendoza of 31 May 1956.

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[1] Certification not reproduced.

14. Letter from Manley O. Hudson to Esteban Mendoza of 26 June 1956.
15. Letter from Manley O. Hudson to Esteban Mendoza of 23 August 1956.
16. Letter from Jorge Fidel Duron to Manley O. Hudson of 30 April 1957.
17. Letter from Ramon E. Cruz to Manley O. Hudson of 25 June 1957.
18. Telegram from United States Embassy Tegucigalpa to Secretary of State of 19 March 1957.
19. Letter from Whiting Willauer, United States Ambassador to Honduras, to R. R. Rubottom, Acting Assistant Secretary of State for Inter-American Affairs, of 19 March 1957.
20. Memorandum for the Department of State, Office of the Legal Adviser, 10 December 1946, transmitting Memorandum entitled "Reference to International Court of Justice of Disputes Under Trusteeship Agreement for Japanese Mandated Islands", 6 December 1946. (Note: The only available copy of this memorandum is of poor quality and difficult to read, especially at page 4, which contains the material relevant to this case. Therefore, for the convenience of the Court, the United States has included a retyped version of that page.)
21. "President's Power to Give Notice of Termination of US-ROC Mutual Defense Treaty", Memorandum for the Secretary of State from the Legal Adviser, Department of State, 15 December 1978, as reproduced in Treaty Termination, *Hearings before the Committee on Foreign Relations*, United States Senate, Ninety-Sixth Congress, First Session, April 9, 10 and 11, 1979.
22. Statement of Abram Chayes, Harvard University, Cambridge, Massachussetts, Treaty Termination, *Hearings before the Committee on Foreign Relations*, United States Senate, Ninety-Sixth Congress, First Session, April 9, 10 and 11, 1979, pp. 306-312.
23. Questions to and Answers by Abram Chayes, Treaty Termination, *Hearings before the Committee on Foreign Relations*, United States Senate, Ninety-Sixth Congress, First Session, April 9, 10 and 11, 1979, pp. 327-333.
24. Statement of Herbert J. Hansell, Legal Adviser, Department of State, Treaty Termination, *Hearings before the Committee on Foreign Relations*, United States Senate, Ninety-Sixth Congress, First Session, April 9, 10 and 11, 1979, pp. 50-61.
25. Statement of Lawrence A. Hammond, Deputy Assistant Attorney General, Department of Justice, Treaty Termination, *Hearings before the Committee on Foreign Relations*, United States Senate, Ninety-Sixth Congress, First Session, April 9, 10 and 11, 1979, pp. 192-196.
26. Questions to and Answers from the Legal Adviser and the Department of State, Treaty Termination, *Hearings before the Committee on Foreign Relations*, United States Senate, Ninety-Sixth Congress, First Session, April 9, 10 and 11, 1979, pp. 197-208.

102. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

15 October 1984.

I have the honour to transmit to Your Excellency herewith a copy of a letter from the Agent of the United States of America, in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), dated 13 October 1984 and filed in the Registry on 14 October 1984, together with a set of copies of the documents referred to therein.

103. THE AGENT OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

15 October 1984.

I have the honour to transmit herewith, for the convenience of the Court, twenty copies of the relevant portions of the treaty lists referred to in the speech of Professor Brownlie of 9 October 1984 and in Exhibit E of the Exhibits of Nicaragua.

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104. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

15 October 1984.

I have the honour to transmit herewith to Your Excellency a copy of a list of documents provided by the Agent of the United States of America in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America).*

The documents can be consulted in the Library of the Court.

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13 October 1984.

ADDITIONAL DOCUMENTS PROVIDED BY THE UNITED STATES TO THE INTERNATIONAL COURT OF JUSTICE FOR ITS CONVENIENCE

- Department of External Affairs (Canada), *Conference Series*, 1945, No. 2, Report on the United Nations Conference on International Organization Held at San Francisco, 25th April-26th June 1945.
- A Commentary on the Charter of the United Nations, Signed at San Francisco on the 26th June, 1945. Presented by the Secretary of State for Foreign Affairs to Parliament (United Kingdom).
- United Nations Conference on International Organization, Report on the Conference Held at San Francisco — 25 April-26 June 1945 by the Rt. Hon. Peter Fraser, Chairman of the New Zealand Delegation.
- Relatorio da Delegacao do Brasil, a Conferencia das Nacoes Unidas para a Organizacao Internacional — 1946.
- "Exposicion del Señor Ministro de Relaciones Exteriores al Honorable Congreso Nacional pidiendo la aprobacion de la Carta de las Naciones Unidas, el Estatuto de la Corte Internacional de Justicia y los Acuerdos Provisionales Concertados por los Gobiernos Participantes en la Conferencia de las Naciones Unidas sobre Organizacion Internacional (Managua, D.N., 2 de Julio de 1945)", in Republica de Nicaragua, *Memoria Presentada al Honorable Congreso Nacional por el Secretario de Estado en el Despacho de Relaciones Exteriores, 1945.*

"Statement of the Minister of Foreign Relations to the National Congress Requesting the Approval of the United Nations Charter, the Statute of the International Court of Justice, and the Provisional Agreements Concluded by the Governments Participating in the United Nations Conference on International Organization (Managua, July 2, 1945)", in Republic of Nicaragua, *Memorial Presented to the National Congress by the Secretary of State in the Office on Foreign Relations, 1945*.

Draft Treaty on Central America Is Sent to U.N. Security Council, *Washington Post*, 5 October 1984.

Costa Rica: Gutierrez Says Contadora Document Needs Changes, *Panama City ACAN*, as Transcribed in Foreign Broadcast Information Service, 4 October 1984.

105. THE AGENT OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

17 October 1984.

FINAL SUBMISSIONS OF THE GOVERNMENT OF NICARAGUA PRESENTED TO THE COURT IN ACCORDANCE WITH ARTICLE 60, PARAGRAPH 2, OF THE RULES OF COURT

In accordance with Article 60, paragraph 2, of the Rules of Court, I have the honour to communicate the following final submissions presented on behalf of the Government of Nicaragua:

> "Maintaining the arguments and submissions contained in the Memorial presented on 30 June 1984 and also the arguments advanced in the oral hearings on behalf of Nicaragua:
>
> The Government of Nicaragua requests the Court to declare that jurisdiction exists in respect of the Application of Nicaragua filed on 9 April 1984, and that the subject-matter of the Application is admissible in its entirety."

106. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

17 October 1984.

I have the honour to transmit to you herewith a copy of the written text of the Final Submission of Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* as communicated by the Agent of Nicaragua on 17 October 1984, at the end of the last statement made at the hearing on Nicaragua's behalf.

107. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

18 October 1984.

Pursuant to Article 60 (2) of the Rules of Court, the United States has attached hereto its final submissions on the issues of jurisdiction and admissibility in the case of *Nicaragua v. United States of America*.

SUBMISSIONS

May it please the Court, on behalf of the United States of America, to adjudge and declare, for each and all of the reasons presented in the oral argument of the United States and in the Couter-Memorial of the United States of 17 August 1984, that the claims set forth in Nicaragua's Application of 9 April 1984 (1) are not within the jurisdiction of the Court and (2) are inadmissible.

108. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

18 October 1984

I have the honour to transmit to Your Excellency herewith a copy of the written text of the Final Submission of the United States of America in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* as communicated by the Agent of the United States of America on 18 October 1984, at the end of the last statement made at the hearing on behalf of the United States of America.

109. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA[1]

19 November 1984

I have the honour to inform Your Excellency that the Court will sit at 10 a.m. on Monday 26 November 1984 in the Great Hall of Justice at the Peace Palace, The Hague, for the purpose of delivering its judgment on questions of jurisdiction and admissibility in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.

110. LE GREFFIER AU MINISTRE DES AFFAIRES ÉTRANGÈRES D'AFGHANISTAN[2]

19 novembre 1984

Le Greffier de la Cour internationale de Justice a l'honneur de transmettre, sous ce pli, un exemplaire de l'ordonnance rendue par la Cour le 4 octobre 1984[3] sur la déclaration d'intervention de la République d'El Salvador en l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*.

D'autres exemplaires seront expédiés ultérieurement par la voie ordinaire.

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[1] A communication in the same terms was sent to the Agent of the Republic of Nicaragua.

[2] Une communication analogue a été adressée aux autres Etats admis à ester devant la Cour.

[3] *C.I.J. Recueil 1984*, p. 215.

111. THE REGISTRAR TO THE SECRETARY-GENERAL OF THE UNITED NATIONS

26 November 1984.

I have the honour to send you herewith for your information a copy of the edition produced by offset of the Judgment delivered today by the Court on the questions of jurisdiction and admissibility in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. A printed copy will be sent to you as soon as possible, pursuant to Article 95, paragraph 3, of the Rules of Court.

You will recall that with a letter of 10 May 1984 I sent you a copy, for transmission to the Security Council, of the Order made by the Court on that date indicating provisional measures in this case. May I draw your attention in this connection to paragraph 112 of the Judgment of today's date.

112. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA[1]

30 November 1984.

Under the authorization of the President of the Court, I have the honour, with reference to the Judgment delivered by the Court on 26 November 1984 on the questions of jurisdiction and admissibility in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, to inform you of the inclusion in the French text of that decision of a sentence whose equivalent had been edited out of the authoritative English text. The sentence in question is marked as deleted in the enclosed page, which I have initialled for the purpose of its insertion in the official copy of the Judgment handed to you, where I would be most grateful if you would ensure that it replaces the corresponding original page. A similar correction is to be effected in the official copy of the Judgment placed in the archives of the Court and in copies of the mimeographed edition.

I have further to inform you that, in consequence of the above deletion, Judge Ago has kindly agreed to that of the final sentence of paragraph 21 of his separate opinion, which consisted of a quotation of the text affected. An initialled copy of the page concerned is also enclosed herewith. In this connection, I take the opportunity of further enclosing, pending the availability of the printed text, a mimeographed translation of Judge Ago's opinion so as to complete for you the English text of the Judgment and opinions.

The printed edition will of course take account of all corrigenda and will be supplied to you immediately upon becoming available.

113. LE GREFFIER AU MINISTRE DES AFFAIRES ÉTRANGÈRES D'AFGHANISTAN[2]

10 décembre 1984.

Le Greffier de la Cour internationale de Justice a l'honneur de transmettre, sous ce pli, un exemplaire de l'arrêt rendu par la Cour le 26 novembre 1984[3] sur les questions de la compétence de la Cour et de la recevabilité de la requête en l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci* (*Nicaragua c. Etats-Unis d'Amérique*).

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[1] A communication in the same terms was sent to the Agent of the Republic of Nicaragua.

[2] Une communication analogue a été adressée aux autres Etats admis à ester devant la Cour.

[3] *C.I.J. Recueil 1984*, p. 392.

Il convient de noter que, pour que l'arrêt soit rapidement disponible, les opinions des juges jointes à celui-ci n'ont été reproduites que dans la langue originale (anglais ou français).

D'autres exemplaires imprimés où figurera la traduction des opinions seront expédiés par la voie ordinaire dès leur sortie de presse.

114. THE COUNSELOR FOR LEGAL AFFAIRS OF THE EMBASSY OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

18 January 1985.

I have been authorized and instructed by Mr. Davis R. Robinson, Agent of the United States of America, to sign and transmit to you the enclosed letter from Mr. Robinson.

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18 January 1985.

I have the honor to refer to the case of *Nicaragua* v. *United States of America*, and in particular to the judgment rendered by the Court on 26 November 1984 on the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of Nicaragua's application.

The United States has given the deepest and most careful consideration to the aforementioned judgment, to the findings reached by the Court, and to the reasons given by the Court in support of those findings. On the basis of that examination, the United States is constrained to conclude that the judgment of the Court was clearly and manifestly erroneous as to both fact and law. The United States remains firmly of the view, for the reasons given in its written and oral pleadings that the Court is without jurisdiction to entertain the dispute, and that the Nicaraguan application of 9 April 1984 is inadmissible. Accordingly, it is my duty to inform you that the United States intends not to participate in any further proceedings in connection with this case, and reserves its rights in respect of any decision by the Court regarding Nicaragua's claims.

115. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

18 January 1985.

I have the honour to transmit herewith a copy of a letter received today in the Registry, from the Agent of the United States of America in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*).

116. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA[1]

22 January 1985.

I have the honour to transmit to you herewith the official sealed copy of an Order[2] made today by the President of the Court fixing further time-limits in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*.

117. LE GREFFIER AU MINISTRE DES AFFAIRES ÉTRANGÈRES D'AFGHANISTAN[3]

8 février 1985.

Le Greffier de la Cour internationale de Justice a l'honneur de transmettre, sous ce pli, un exemplaire du texte imprimé de l'ordonnance du 22 janvier 1985[4] par laquelle le Président de la Cour a fixé des délais pour la procédure écrite sur le fond en l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua* c. *Etats-Unis d'Amérique)*.

D'autres exemplaires seront expédiés ultérieurement par la voie ordinaire.

118. THE REGISTRAR TO THE SECRETARY-GENERAL OF THE UNITED NATIONS

13 February 1985.

I have the honour to send you herewith a printed copy of the Order made by the President of the Court on 22 January 1985 fixing time-limits for pleadings on the merits in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*.

119. THE AGENT OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

3 April 1985.

I have the honor to refer to the application of Nicaragua of 9 April 1984 in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, and the Court's Order of 10 May 1984 granting Nicaragua's request for the indication of provisional measures.

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[1] A communication in the same terms was sent to the Agent of the Republic of Nicaragua.

[2] *I.C.J. Reports 1985*, p. 3.

[3] Une communication analogue a été adressée aux autres Etats admis à ester devant la Cour.

[4] *C.I.J. Recueil 1985*, p. 3.

In its Order of 10 May 1984, paragraph 41 (*c*), the Court determined that "until the Court delivers its final judgment in the present case, it will keep the matters covered by this Order continuously under review". Accordingly, Nicaragua has the honor to bring to the Court's attention certain matters in connection with this case that have recently come to light.

On 7 March, two reports were issued in Washington, D.C., concerning the activities of the U.S.-sponsored mercenary forces operating in Nicaragua. Both reports concluded that these forces have engaged and are engaging in extensive abuses of the Nicaraguan civilian population, including: attacks on unarmed civilians including men, women, children and the elderly; premeditated acts of brutality such as rape, beatings, mutilation and torture; individual and mass kidnapping of civilians; assaults on economic and social targets such as farms, cooperatives, food storage facilities and health centers, including a particular effort to disrupt the coffee harvest through attacks on coffee cooperatives and ambushes of vehicles carrying volunteer coffee harvesters; and intimidation and kidnapping of civilians who cooperate in government or community programs, and of religious leaders who support the government.

Both of these reports are hereby submitted to the Court for its review. The first report is entitled "Attacks by the Nicaraguan 'contras' on the Civilian Population of Nicaragua, report of a fact-finding mission September 1984-January 1985". It was prepared by a former Assistant Attorney General of the State of New York, Mr. Reed Brody, at the suggestion of Mr. Paul Reichler, one of the advocates for Nicaragua in this case. Mr. Brody spent five months in Nicaragua interviewing victims and eyewitnesses of the mercenary attacks. He obtained 145 sworn affidavits from these eyewitnesses, and his report is drawn directly from their accounts. His objective was to collect "reliable evidence of a kind that would be legally sufficient in a court of law". He received no compensation from any source and paid for his own travel and other expenses.

The second report was issued jointly by the Washington, D.C.-based organizations, the International Human Rights Law Group ("Law Group") and the Washington Office on Latin America ("Wola"), to whom Mr. Brody presented his findings. In order to verify the accuracy of Mr. Brody's report, the law group and Wola jointly sponsored a separate mission to Nicaragua by two prominent attorneys of their own choosing, Professor Michael Glennon of the University of Cincinnati Law School and Mr. Donald Fox, a member of the executive committee of the American Association for the International Commission of Jurists. In their investigation, Messrs. Fox and Glennon interviewed some of Mr. Brody's affiants as well as others. Their report, like Mr. Brody's report, concludes that the evidence shows that the U.S.-supported "mercenaries" are committing serious abuses against Nicaraguan civilians — abuses they term "acts of illegal terroristic violence". They conclude that "any provision of aid to the contras, directly or indirectly, by the government of the United States would render our government responsible for their acts".

In Nicaragua's Memorial on the merits, to be filed 30 April 1985, Nicaragua will discuss the acts committed by the U.S.-sponsored mercenaries and the responsibility of the United States for them. The meantime, Nicaragua wishes to file these reports with the Court in order that it may be immediately informed of their contents.

120. THE REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

4 April 1985.

I have the honour to transmit to you herewith a copy of a communication dated 3 April 1985, and received in the Registry the same day, from the Agent of Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, together with copies of the enclosures to that communication.

121. THE REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA

1 May 1985.

I have the honour to transmit herewith, pursuant to Article 43, paragraph 4, of the Statute of the Court and Article 52, paragraph 1, of the Rules of Court, a certified copy of the Memorial of Nicaragua on the merits of the case concerning *Military and Paramilitary Activities in and against Nicaragua*, filed in the Registry within the time-limit fixed by the President of the Court in an Order dated 22 January 1985, and also of the twelve separate annexes lettered A through L as listed in the Memorial after the table of contents.

122. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

1 May 1985.

I have the honour to acknowledge receipt in the Registry on 29 April 1985 of two signed copies of the Memorial of Nicaragua on the merits of the case concerning *Military and Paramilitary Activities in and against Nicaragua*, together with annexed documents, and also of additional copies as required by the Registry under Article 52, paragraph 1, of the Rules of Court.

Pursuant to Article 43, paragraph 4, of the Statute of the Court, I am communicating one of the signed copies to the Agent of the United States of America, together with a set of the annexes.

123. THE REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA[1]

10 June 1985.

I note that no Counter-Memorial on the merits has been filed by the Government of the United States of America in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* within the time-limit fixed therefor by the Order of 22 January 1985, and that no request for any extension of that time-limit has been received. I enclose for your information a copy of a letter which I have today addressed to the Agent of Nicaragua in that respect.

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[1] A communication in the same terms was sent to the Agent of the Republic of Nicaragua.

124. THE FIRST SECRETARY TO THE AGENT OF THE REPUBLIC OF NICARAGUA[1]

20 June 1985.

Further to the Registrar's letter of 10 June 1985, I have the honour to inform Your Excellency that the President of the Court, in the exercise of his powers under Article 54 of the Rules of Court, has fixed Thursday 12 September 1985, at 10 a.m., for the opening of the oral proceedings on the merits in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.

125. THE EMBASSY OF THE ISLAMIC REPUBLIC OF IRAN TO THE REGISTRY OF THE INTERNATIONAL COURT OF JUSTICE

9 July 1985.

The Embassy of the Islamic Republic of Iran has the honour to bring to the attention of the Registry of the International Court of Justice the following:

Regarding the case *Nicaragua* v. *United States of America* (Military and Paramilitary Activities in and against Nicaragua) the Embassy would appreciate being informed by the Registry the reasons, that were put forward and accepted by the Court, for the time-limits that were fixed for the written proceedings (30 April 1985 for the Memorial for the Republic of Nicaragua and 31 May 1985 for the Counter-Memorial of the United States of America) to be postponed again.

The information will be forwarded to the Legal Affairs and Treaties Department of the Ministry of Foreign Affairs of the Islamic Republic of Iran.

126. THE REGISTRY TO THE EMBASSY OF THE ISLAMIC REPUBLIC OF IRAN

11 July 1985.

The Registry of the International Court of Justice presents its compliments to the Embassy of the Islamic Republic of Iran in the Netherlands and, with reference to the Embassy's Note No. 1486 of 9 July 1985, has the honour to point out that, contrary to the Embassy's impression, the time-limits fixed by the President of the Court in an Order of 22 January 1985 for the filing of pleadings on the merits in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* were not extended. Nicaragua filed a Memorial within the time-limit prescribed, whereas the United States filed no Counter-Memorial. Following expiry of the time-limit fixed for the latter pleading, the Court, having regard to its calendar overall, decided that the hearing on the merits would start on 12 September 1985.

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[1] A communication in the same terms was sent to the Agent of the United States of America.

127. THE REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA

5 September 1985.

Further to the letter addressed to you on 20 June 1985 from one of the First Secretaries of the Court, I have the honour to inform you that the President of the Court, in the exercise of his powers under Article 31 of the Rules of Court, has agreed to receive on 10 September 1985, at a time to be fixed and communicated subsequently, the Agent and Counsel of Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* for the purpose of ascertaining their views with regard to questions of procedure in connection with the oral proceedings on the merits scheduled to start on Thursday, 12 September 1985.

128. THE AGENT OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

10 September 1985.

I have the honor to refer to the Application of Nicaragua of 9 April 1984 in the case concerning *Military and Paramilitary Activities in and against Nicaragua*.

In accordance with Article 57 of the Rules of Court, Nicaragua hereby submits the attached list identifying the witnesses it intends to call in the oral proceedings commencing 12 September 1985, and describing in general terms the points to which their evidence will be directed.

WITNESS LIST OF NICARAGUA

1. Commander Luis Carrión

Commander Luis Carrión is First Vice Minister of the Interior of the Republic of Nicaragua. Previously he served as Vice Minister of Defense. His address is Ministerio del Interior, Managua, Nicaragua. He is a citizen of Nicaragua.

As First Vice Minister of the Interior, Commander Carrión is responsible for State security. In addition, he has been commissioned by the President of the Republic to oversee all governmental operations, including all military operations, in the principal war zone. In both capacities, he is responsible for monitoring military and paramilitary activities of the United States against the citizens of Nicaragua. Commander Carrión is expected to testify about the military and paramilitary activities, in and against Nicaragua and the involvement of the United States in these activities.

2. Dr. David C. MacMichael

Dr. David C. MacMichael is a citizen of the United States. His address is 11442 Orchard Lane, Reston, Virginia. Dr. MacMichael is an expert in intelligence methods and analysis with particular reference to counter-insurgency and the supply of arms to guerrillas in the field. From March 1981 to April 1983, he was employed by the United States Central Intelligence Agency in the Analytic Group of the National Intelligence Council. Dr. MacMichael is expected to testify concerning: the intelligence sources and methods available to and used by the United States Government for surveillance of Nicaragua for the collection of information concerning alleged arms shipments from Nicaragua to the insurgents in El Salvador; the intelligence collected from those sources and by these methods; and his conclusions, based on the intelligence obtained by the United States Government, as to the existence of any such shipments by or with the complicity of the Government of Nicaragua. Dr. MacMichael will not disclose any information that is classified by the United States Government, or that he is prohibited by United States law or by the terms of his employment contract from disclosing to the public.

3. *Professor Michael J. Glennon*

Professor Michael J. Glennon is a citizen of the United States. His address is 3455 Cornell Place, Cincinnati, Ohio. Professor Glennon is a Professor of Law at the University of Cincinnati College of Law, and formerly Legal Counsel to the Foreign Relations Committee of the United States Senate (1977-1980). Professor Glennon was co-author of a Report to the International Human Rights Law Group and the Washington Office of Latin America, entitled "Abuses Against Civilians by Counterrevolutionaries Operating in Nicaragua", April 1985. He is expected to testify concerning the nature and scope of the factfinding mission in which he participated in Nicaragua in February 1985, and the findings contained in the report concerning attacks aimed at the civilian population of Nicaragua and the responsibility of the United States for such attacks.

4. *Father Jean Loison*

Father Jean Loison is a Roman Catholic priest. He is a citizen of France. His address is Hospital de La Trinidad, Departament de Esteli, Nicaragua. Father Loison works as a nurse at the Hospital de La Trinidad, which is located in the principal war zone in Nicaragua. He ministers to persons wounded in attacks in and against Nicaragua by military and paramilitary forces operating under the direction and control of the United States Government. He is expected to testify concerning attacks by those forces in the region where he lives and works.

5. *William Huper*

William Huper is Minister of Finance of the Republic of Nicaragua. His address is Ministerio de Finanzas, Managua, Nicaragua. He is a citizen of Nicaragua. Prior to his service in the Government of Nicaragua, Mr. Huper was Professor of Economics at the National Autonomous University of Mexico in Mexico City, Mexico, and Professor of History at the National Autonomous University of Nicaragua in Léon, Nicaragua. He was appointed Vice Minister of Finance in August 1979 and Minister of Finance in January 1985. Mr. Huper is expected to testify concerning certain of the effects of the United States military and paramilitary attacks in and against Nicaragua on Nicaragua's economy.

6. Edgar Chamorro

Nicaragua will also present, in the form of a written affidavit, the testimony of Edgar Chamorro, a citizen of Nicaragua whose address is 640 Allendale Road, Key Biscayne, Florida, in the United States. Mr. Chamorro served from 1982 to November 1984 as a member of the "political directorate" of the Nicaraguan Democratic Force ("FDN"), the largest force conducting military and paramilitary activities against Nicaragua under the direction and control of the United States Government. His testimony will describe the nature and extent of United States direction and control of these activities. Mr. Chamorro is unable to appear in person because, as explained in his affidavit, he has been advised by his attorneys that travel outside the United States at the present time could prejudice his pending application for permanent resident status in the United States and result in his exclusion from the United States.

129. THE AGENT OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

10 September 1985.

I have the honor to refer to the Application of Nicaragua of 9 April 1984 in the case concerning *Military and Paramilitary Activities in and against Nicaragua.*

Nicaragua hereby submits to the Court copies of Supplemental Annexes A through G[1] to its Memorial of 30 April 1985 on the Merits, to which reference will be made at the oral proceedings commencing 12 September 1985.

130. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

10 September 1985.

I have the honour to draw your attention to the following provisions of Article 71 of the Rules of Court:

> "1. A verbatim record shall be made by the Registrar of every hearing, in the official language of the Court which has been used . . .
>
> 4. Copies of the transcript shall be circulated to the judges sitting in the case, and to the parties. The latter may, under the supervision of the Court, correct the transcripts of speeches and statements made on their behalf, but in no case may such corrections affect the sense and bearing thereof . . ."

The transcript of the oral proceedings opening on Thursday, 12 September 1985 will be circulated to the Parties as follows: the transcript of a hearing held from 10 a.m. to 1 p.m. will be available in the evening of the same day, and that of a hearing held from 3 to 6 p.m. will be available during the morning of the following day.

In order to facilitate any supervision which the Court may feel it proper to exercise, I shall be obliged if you will hand your corrections to my secretary as soon as possible after the circulation of each transcript, and in any event not later than 6 p.m. on the day following such circulation.

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[1] **IV**, pp. 370-454.

131. THE REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA[1]

11 September 1985.

I have the honour, in connection with the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), and with reference to Article 53, paragraph 2, of the Rules of Court, to inform you that, as in previous similar instances, the Court is to take a decision on making accessible to the public, on or after the opening of the oral proceedings, copies of the pleadings and documents annexed. I will not fail to transmit to the Court any views that your Government may express on the subject, prior to the opening of such proceedings.

132. THE REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA

11 September 1985.

I have the honour, with reference to the oral proceedings on the merits in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), to send you herewith a copy of a letter, with annex, dated 10 September 1985 in which the Agent of Nicaragua provides a list of the witnesses he intends to call and describes in general terms the points to which their evidence will be directed.

133. THE REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA

11 September 1985.

I have the honour, with reference to the oral proceedings on the merits in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), to send you a copy of a letter dated 10 September 1985 from the Agent of Nicaragua and also of the documents supplied by him therewith.

134. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

11 September 1985.

I have the honour to acknowledge receipt of Your Excellency's letter of 10 September 1985 on the subject of the witnesses whom you intend to call during the oral proceedings on the merits in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, as also of the descriptive list attached thereto.

I also acknowledge the receipt of your letter of 10 September 1985 enclosing a list of documents to which it is intended that reference should be made in the course of the hearing, together with twenty-five copies of the documents themselves, presented as "Supplemental Annexes A-G".

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[1] A communication in the same terms was sent to the Agent of the Republic of Nicaragua.

I am however to inform you that the Court, having regard to Article 56 of the Rules of Court, authorizes the production of those documents solely within the context of the oral proceedings.

Copies of all the above-mentioned letters, lists and documents have been transmitted to the other Party.

135. THE REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA

11 September 1985.

Further to my letter of today's date transmitting to you copies of seven documents submitted by the Agent of Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, I have the honour to inform you that the Court, having regard to Article 56 of its Rules, has decided to authorize the production of those documents solely in the context of the oral proceedings on the merits.

136. LE GREFFIER AU MINISTRE DES AFFAIRES ÉTRANGÈRES DES PAYS-BAS

11 septembre 1985.

Me référant à l'alinéa final des principes généraux de l'accord du 24 juin 1946 entre le Gouvernement des Pays-Bas et la Cour internationale de Justice, j'ai l'honneur de porter à votre connaissance que, en l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*, le Nicaragua désire faire entendre les témoins dont les noms suivent, lors des audiences qui commenceront le 12 septembre 1985 :

[Voir ci-dessus pp. 413-415.]

Je ne manquerai pas de vous faire part de toute modification éventuelle.

137. LE GREFFIER AU MINISTRE DES AFFAIRES ÉTRANGÈRES DES PAYS-BAS

12 septembre 1985.

Me référant au paragraphe V des principes généraux de l'accord du 26 juin 1946 entre le Gouvernement des Pays-Bas et la Cour internationale de Justice, j'ai l'honneur de porter à votre connaissance que, à l'audience qui se tiendra ce jour en l'affaire relative aux *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*, la République du Nicaragua sera représentée comme suit :

[Voir ci-dessus p. 3.]

138. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

12 September 1985.

I have the honour to acknowledge the receipt today of a list, signed by Your Excellency, of the persons representing Nicaragua during the oral proceedings on the merits in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, and also of a certified original of the affidavit of Mr. Edgar Chamorro, dated 5 September 1985, of which you had provided copies on 10 September.

139. THE REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA

12 September 1985.

Further to my letter of 11 September 1985 transmitting copies of documents submitted by Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, I have the honour to inform you that the Agent of Nicaragua has deposited in the Registry a certified original of the affidavit of Mr. Edgar Chamorro, dated 5 September 1985, presented as "Annex G" in the list of the documents concerned.

140. THE REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA

12 September 1985.

I have the honour to transmit to you herewith three copies of the provisional verbatim record of the public hearing held today in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.

You will similarly be sent three copies of all further verbatim records in the case.

141. THE REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA

13 September 1985.

I have the honour to send you herewith a copy of the list provided by the Agent of Nicaragua of the persons representing his Government at the oral proceedings on the merits in the case concerning *Military and Paramilitary Activities in and against Nicaragua*.

142. THE AGENT OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

16 September 1985.

I have the honor to refer to the Application of Nicaragua of 9 April 1984 in the case concerning *Military and Paramilitary Activities in and against Nicaragua*.

Nicaragua wishes to submit to the Court the document enclosed herewith as Supplemental Annex H to its Memorial of 30 April. It is a copy of a note delivered by the United States Department of State to the Embassy of Nicaragua in Washington on May 1, 1985, giving notice of the United States' intention to terminate the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua one year from the effective date of the note.

Thirty copies of this document are provided herewith for the Court's convenience.

143. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA[1]

16 September 1985.

In connection with the hearing of witnesses in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, I have the honour to inform you as follows.

One copy of the transcript of each witness's evidence, prepared in accordance with the provisions of Article 71, paragraph 5, of the Rules of Court, is being made available to the witness as soon as possible after the evidence has been given. The witness is being asked to insert in the transcript corrections of any mistakes that may have occurred and return the signed corrected copy to me within 24 hours, in order to facilitate any supervision that the Court may think it proper to exercise in respect of any corrections made.

144. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

16 September 1985.

I have the honour to acknowledge receipt of Your Excellency's letter of 16 September 1985 enclosing a document presented as Supplemental Annex H to the Memorial on the merits in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, as also, previously, of a copy of a newspaper item presented as additional to Annex D. Copies of your letter, and of both the above documents, have been provided to the other Party.

I have, further, to take this opportunity of drawing renewed attention to the Court's decision, recorded in my letter 74610 of 11 September 1985, whereby the production of documents is now authorized solely within the context of the oral proceedings.

145. THE REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA

16 September 1985.

With reference to my letters 74608, 74614, 74618 and 74619, of 11 and

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[1] A communication in the same terms was sent to the Agent of the United States of America.

12 September 1985, I have the honour to enclose a further document, together with a covering letter of today's date, which I have received from the Agent of Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua*.

146. THE REGISTRAR TO MR. MACMICHAEL

17 September 1985.

Article 71, paragraph 5, of the Rules of Court provides:

> "Witnesses and experts shall be shown that part of the transcript which relates to the evidence given, or the statements made by them, and may correct it in like manner as the parties."

You have been furnished with a copy of the transcript of the evidence given by you yesterday as it appears in the verbatim record of the hearing held on that day. I shall be obliged if, after inserting in the transcript of your evidence corrections of any mistakes that may have occurred, you would be good enough to sign it and return it to me within 24 hours, in order to facilitate any supervision that the Court may think it proper to exercise in respect of any corrections made.

147. THE AGENT OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

20 September 1985.

Final Submissions of the Government of Nicaragua Presented to the Court in Accordance with Article 60, Paragraph 2, of the Rules of Court

In accordance with Article 60, paragraph 2, of the Rules of Court, I have the honour to communicate the following final submissions presented on behalf of the Government of Nicaragua:

"Maintaining the arguments and submissions contained in the Memorial presented on 30 April 1985 and also the arguments advanced in the oral hearings on behalf of Nicaragua:

The Republic of Nicaragua respectfully requests the Court to grant the following relief:

First: the Court is requested to adjudge and declare that the United States has violated the obligations of international law indicated in its Memorial of 30 April 1985, and that in particular respects the United States is in continuing violation of those obligations.

Second: the Court is requested to state in clear terms the obligation which the United States bears to bring to an end the aforesaid breaches of international law.

Third: the Court is requested to adjudge and declare that, in consequence of the violations of international law indicated in its Memorial, compensation is due to Nicaragua, both on its own behalf and in respect of wrongs inflicted upon its nationals; and the Court is requested further to receive evidence and to determine, in a subsequent phase of the present proceedings, the quantum of damages to be assessed as the compensation due to the Republic of Nicaragua.

Fourth: without prejudice to the foregoing request, the Court is requested to award to the Republic of Nicaragua the sum of 370,200,000 United States dollars, which sum constitutes the minimum valuation of the direct damages, with the exception of damages for killing nationals of Nicaragua, resulting from the violations of international law indicated in the substance of its Memorial.

With reference to the fourth request, the Republic of Nicaragua reserves the right to present evidence and argument, with the purpose of elaborating the minimum (and in that sense provisional) valuation of direct damages and, further, with the purpose of claiming compensation for the killing of nationals of Nicaragua and consequential loss in accordance with the principles of international law in respect of the violations of international law generally, in a subsequent phase of the present proceedings in case the Court accedes to the third request of the Republic of Nicaragua."

148. THE DEPUTY-REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA

24 September 1985.

Pursuant to Article 60, paragraph 2, of the Rules of Court, I have the honour to transmit to you herewith a copy of the final submissions of the Republic of Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, received in the Registry of the Court on 23 September 1985.

149. THE DEPUTY-REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA

1 October 1985.

I refer to the Registrar's letter of 12 September 1985, concerning the transmission to you of three copies of the provisional verbatim records of the public hearings in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. I now have the honour to transmit to you copies of records numbered CR 85/19, 20, 21, 22, 23, and 25[1], incorporating corrections made by the witnesses called by Nicaragua to the record of their evidence, and corrections by Judge Schwebel to the transcript of questions put by him.

150. THE LEGAL COUNSEL OF THE UNITED NATIONS TO THE REGISTRAR

(Facsimile)

7 October 1985.

Received on 7 October 1985 Termination by the USA of the ICJ Statute. Text reads as follows:

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[1] *Supra*, pp. 7-402.

"October 7, 1985

Dear Mr. Secretary General:

I have the honor on behalf of the Government of the United States of America to refer to the declaration of my Government of 26 August 1946, as modified by my note of 6 April 1984, concerning the acceptance by the United States of America of the compulsory jurisdiction of the International Court of Justice, and to state that the aforesaid declaration is hereby terminated, with effect six months from the date hereof.

(*Signed*) George P. SHULTZ."

151. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

14 October 1985.

I have the honour to transmit to Your Excellency herewith the text of questions put by Judge Schwebel to the Government of Nicaragua in the context of the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.

QUESTIONS OF JUDGE SCHWEBEL FOR NICARAGUA

14 October 1985

The Declaration of Intervention of the Republic of El Salvador filed in the Registry of the Court on 15 August 1984 states, in paragraph VI:

> "The facts concerning the deaths, which occurred in April 1983 in Managua, of the two Salvadorian subversive leaders, Melida Anaya Montes and Cayetano Carpio, confirmed once again the presence of the subversive leadership of the FMLN in Nicaragua, and demonstrated their close ties with the Sandinista leadership." (**II**, p. 452.)

In view of these allegations, the following questions are asked of the Agent of Nicaragua:

1. Does Nicaragua acknowledge that Melida Anaya Montes and Cayetano Carpio died in Nicaragua? If so, under what circumstances?
2. If Nicaragua acknowledges the deaths of Melida Anaya Montes and Cayetano Carpio in Nicaragua, when and under what circumstances did each of them come to Nicaragua, how long did each of them stay in Nicaragua, did each of them establish residence in Nicaragua, and what were their occupations in

Nicaragua? Were Melida Anaya Montes and Cayetano Carpio connected with the insurgency in El Salvador? Did they occupy or work at or out of a building or headquarters in Nicaragua for Salvadorian insurgents?

3. If Nicaragua acknowledges that Melida Anaya Montes and Cayetano Carpio were present in Nicaragua, can that acknowledgment be reconciled with the apparent position of the Nicaraguan Government (see *supra*, pp. 236-237, 123) that Nicaragua has not permitted the establishment on Nicaraguan territory of leadership of the Salvadorian insurgency?

152. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

14 October 1985.

I have the honour to inform Your Excellency that, for the purpose of its further examination of the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the Court requests the Government of Nicaragua to make available to it the following information and documents:

1. In paragraphs 29, 34 and 78 of the Memorial of Nicaragua on the merits of the case, reference is made to three "presidential findings" made by the President of the United States, the first dated 9 March 1981, the second 1 December 1981, and no date being given for the third, save that it was presented to Committees of the United States Senate and House of Representatives on 20 September 1983. Can the Nicaraguan Government supply the Court with an official text of those "findings", or failing an official text, the most authoritative evidence thereof available?

2. According to a paper entitled "The Mining of Nicaraguan Ports" issued by the Central American Historical Institute, produced by Nicaragua as Attachment 1 in Annex J to the Memorial, the [Nicaraguan] Ministry of Defence issued a communiqué on that subject on 29 March 1984. The Nicaraguan Government is requested to supply the Court with an official text of that communiqué, together with a translation into one of the official languages of the Court.

I avail myself of this opportunity to recall to Your Excellency's attention the fact that certain information to be supplied by witnesses called by the Government of Nicaragua (see *supra*, pp. 27 and 34) has not yet been received, and that certain questions put by Members of the Court (see *supra*, pp. 123, 140-145 and 189) have not yet been fully answered.

153. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

14 October 1985.

I have the honour to inform Your Excellency that, for the purpose of its further examination of the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the Court requests the Government of Nicaragua to make available to it the following information and documents:

1. It is understood that on 12 July 1979 the Provisional Government of National Reconstruction of Nicaragua addressed a letter to the Secretary General of the Organization of American States, transmitting a "Plan to achieve peace". The Nicaraguan Government is requested to supply the Court with a copy of that letter and of its various annexes, with (if appropriate) a translation into one of the official languages of the Court.

2. It is understood that conversations were held in Managua at the end of 1980 between the Nicaraguan Head of State and the Minister for Foreign Affairs and the United States Deputy Assistant Secretary of State for Central American Affairs, on the subject of the aid given, according to the United States Government, to the opponents of the Government of El Salvador. The Nicaraguan Government is requested to supply the Court with copies of any contemporary memoranda or records of those conversations.

3. It is understood that on 20 October 1983 the Government of Nicaragua submitted certain draft documents to the United States Government, relating to problems concerning the relations between the two countries, and possibly with other countries of the region. The Nicaraguan Government is requested to supply the Court with copies of such draft documents, and of the covering letter transmitting them to the United States Government, and any other pertinent documents.

Should the Government of Nicaragua wish any of the documents referred to above to be treated as confidential, being made accessible only to the Members of the Court and to the other Party, no doubt you will so inform me, and I shall seek the further instructions of the Court.

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154. THE REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA

14 October 1985.

I have the honour to transmit to you herewith copies of two letters which I have today sent to the Agent of Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, concerning requests by the Court for information and documents. I also enclose a copy of a further letter, also of today's date, by which I transmitted to the Agent of Nicaragua a question put by Judge Schwebel, together with a copy of the text of that question.

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155. THE AGENT OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

15 October 1985.

I have the honour to refer to the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.

During the oral hearings on the merits of the case in reference, several questions were asked by the Court, which I now proceed to answer.

In the first place, I refer to the Questions of Judge Schwebel to the Agent of Nicaragua.

While each of these questions was answered by the Agent of Nicaragua in his closing speech on 20 September 1985, in the interest of assisting the Court I shall indicate here in precisely at what portion of the transcript these questions were answered.

Question at CR 85/24, pages 44-45: This question was answered by the Agent of Nicaragua at CR 85/27, pages 74-75 (see also CR 85/25, p. 15)[1]. The Government of Nicaragua has never supplied arms to rebels in El Salvador or condoned the supply of arms by others from Nicaraguan territory. My Government has never permitted the establishment of the leadership of the Salvadoran insurgents in Command centers in Nicaragua. My Government, like the Government of the United States and other governments in Central and South America, has granted entry to leaders of the Salvadoran insurgency from time to time. My Government has never collaborated in the training of Salvadoran insurgents or permitted them to be trained by others in Nicaraguan territory. My Government did not collaborate in the organization of the insurgency in El Salvador. Thus, there is no validity to any argument of "mirror images".

Question No. 1, CR 85/25, page 10: This question was answered by the Agent of Nicaragua at CR 85/27, pages 75-76, and by Professor Chayes at CR 85/24, pages 71-75[2].

Question No. 2, CR 85/25, page 11: This question was answered by the Agent of Nicaragua at CR 85/27, pages 75-76, and by Professor Chayes at CR 85/24, pages 71-75[3].

Question No. 3, CR 85/25, page 11[4]: My Government has no transcript or tape recording of the interview in question and has no knowledge of the existence of any such transcript or tape recording.

Questions No. 4 and 5, CR 85/25, page 11: These questions were answered by the Agent of Nicaragua at CR 85/27, page 75 and by Professor Chayes at CR 85/24, page 71[5]. Nicaragua's counsel have never stated or implied that the Government of Nicaragua supplied arms to rebels in El Salvador or condoned the supply of arms by others from Nicaraguan territory. Any newspaper article purporting to attribute such statements or implications to Nicaragua's counsel is inaccurate.

Question No. 6, CR 85/25, pages 11-13[6]: This does not appear to be a question. It appears to be a series of quotations from materials that were not submitted by the Parties to the Court and do not constitute evidence in this case.

Question No. 7, CR 85/25, page 14: This question was answered by the Agent of Nicaragua at CR 85/27, pages 74-76 and CR 85/25, pages 15-16[7]. It was never the policy of my Government to supply or ship arms to Salvadoran guerrillas. Consequently, it was never the policy of my Government to use the airstrip at Papalonal or any other part of Nicaraguan territory for such purpose. It was also never the policy of my Government to seek to overthrow the Government of El Salvador.

Secondly, the question posed by Judge Ruda.

1. In its Application, Nicaragua requested the Court to adjudge and declare:

"(*a*) That the United States, in recruiting, training, arming, equipping,

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[1] Pp. 123; 236-237; 146, *supra*.
[2] Pp. 142; 236-237; 136-139, *supra*.
[3] *Ibid*.
[4] P. 143, *supra*.
[5] Pp. 143; 236-237; 136, *supra*.
[6] Pp. 143-144, *supra*.
[7] Pp. 144; 236-237; 146, *supra*.

> financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua, has violated and is violating its express Charter and treaty obligations to Nicaragua and, in particular, its Charter and treaty obligations under:
>
> Article 8 of the Convention on Rights and Duties of States,
> Article I, Third, of the Convention concerning the Duties and Rights of States in the Event of Civil Strife." (Application, para. 26.)

2. In its Memorial on the merits, filed 30 April 1985, and in its oral pleadings, Nicaragua did not refer specifically to its claims under these two conventions, as stated by the Agent of Nicaragua in response to a question from Judge Ruda. However, Nicaragua has not abandoned these claims[1].

3. In its Memorial and oral pleadings, Nicaragua emphasized the long history of U.S. military and political intervention in Latin America and the evolution of a special legal order in the western hemisphere the very purpose of which was to outlaw such intervention by the United States. (Memorial, paras. 324-331; CR 85/26, pp. 24-26[2].) This regional legal order established direct obligations of the United States to its Latin American neighbors that have a significance even beyond the universal obligations under the United Nations Charter. Because Nicaragua has been one of the most frequent victims of the U.S. military intervention it was argued, Nicaragua is in real sense a special beneficiary of these obligations. (CR 85/26, p. 26[3].)

4. These obligations, now embodied in the Charter of the Organization of American States, have a long juridical history both in the customary and conventional law of the western hemisphere. The famed Calvo Doctrine, enunciated early in the 19th century, although most often cited in cases of diplomatic intervention to collect private debts, was in fact directed against military intervention, as well, *a fortiori*. Other 19th-century jurists, such as Andres Bello, Genaro Estrada and Luis Maria Drago, were equally explicit. (See, e.g., I. Fabela, "Intervention", p. 134, Paris: Pedone 1961 — D. Antokoletz, "Tratado de Derecho Internacional Publico", pp. 53-58, Buenos Aires: La Facultad, 5th ed., 1951.) The history of attempts to deal with the problem by means of positive international law is equally lengthy. It dates back, according to some, to the Treaty of Perpetual Union, League and Confederation of 1828 and the Treaty of Confederation of 1848. (Antokoletz, *op. cit.*, pp. 50-53.)

5. As Nicaragua states in its Memorial and oral pleadings, these efforts came to a head in the series of Pan American conferences of the 1920s and 1930s, in which, step by step, the Latin American States forced the United States to relinquish its claims to a special right to intervene militarily or otherwise in their affairs.

6. Major milestones in this evolution were the Convention on Rights and Duties of States and the Convention concerning the Rights and Duties of States in the Event of Civil Strife, under which Nicaragua claims in this case. It is Nicaragua's belief, however, that the duties and obligations established by these conventions have been subsumed in the OAS Charter, which is the climactic event of the juridical evolution described. Indeed, the language of the OAS Charter owes much to the provisions of the earlier conventions. Further, it is Nicaragua's belief, that the rights and duties contained in these conventions are, at present, principles of customary and general intrnational law. In order not to

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[1] See No. 158, *infra*.
[2] Pp. 184-185, *supra*.
[3] P. 185, *supra*.

burden the Court with repetitive material, separate argument directed specifically to the conventions was omitted from Nicaragua's pleadings.

7. For example, Article 8 of the Convention on Rights and Duties of States provides: "no State has the right to intervene in the internal or external affairs of another". Article 11 provides:

> "... the territory of a State is inviolable and may not be the object of military occupation nor of other measures of force imposed by another State directly or indirectly or for any motive whatever even temporarily".

These provisions are incorporated substantially verbatim in the OAS Charter, Articles 18 and 20.

8. The subcommittee that considered the draft (chaired by Raymundo Rivas of Colombia) resolved unanimously to include in its report the following definition:

> "any act of a State, through diplomatic representation, by armed force, or by any other means involving effective force, with a view to making the State's will dominate the will of another State, and, in general, any maneuver, interference or interposition of any sort, employing such means, either directly or indirectly in the matter of the obligations of another State, whatever its motive, shall be considered as intervention and likewise a violation of international law". (Minutes and antecedents of the Seventh International Conference of American States, 1933.)

9. The Convention on Rights and Duties of States in the Event of Civil Strife was signed at Havana on 20 February 1928 and entered into force for the United States on 21 May 1930. Under the provisions of Article 1 (3), under which Nicaragua claims, the United States binds itself "to forbid traffic in arms and war materials. Except when intended for the government. ..." It is obvious from this record that the United States not only breached its duty to forbid traffic in weapons and war materials from its territory to the *contras*, but that it was the principal trafficker and has in fact provided them with most of their weapons. Nicaragua, however, believes that the provision simply spells out one species of armed intervention, prohibited under Articles 18, 20 and 21 of the OAS Charter. The United States, on the record before the Court, is also in admitted violation of Article 1 (1) of the Convention, which requires the parties "to use all means at their disposal to prevent the inhabitants of their territory, nationals or aliens, from participating in, gathering elements, crossing the boundaries or sailing from their territory for the purpose of starting or promoting civil strife". Not only has the United States failed to prevent such actions — it has sent persons, both nationals and aliens, from its territory to conduct military and paramilitary attacks against Nicaragua. It has actively sought to "start" or "promote" civil strife in Nicaragua, where none exists. The *contras*, as the evidence shows, have no indigenous support in Nicaragua and would disappear as an effective force in the absence of the support, direction and control of the United States as was so fully disclosed in the testimony. This lawless effort to foment civil strife has failed dismally, so that *stricto sensu*, the military and paramilitary attacks launched by the United States against Nicaragua do not constitute a case of civil strife. They are essentially the acts of the United States.

I have received a telex communication from Commander Luis Carrion, giving the information requested by Judge Colliard during Commander Carrion's deposition.

Commander Carrion has requested that I should communicate this information to the Court.

The names and nationalities of the vessels are as follows:

"The 1984-1985 and 1985-1986 editions of *Register of Ships* (published by Lloyd's Register of Shipping) lists the following companies as the owners of the foreign ships damaged by CIA mines in Nicaraguan harbors:

1. *Geoponte VI*, Volker Stevin baggermaatschappij Nederland, Oostmaaslaan 71, P.O. Box 2695, 3000 CR Rotterdam, Netherlands.
2. *Los Caribes*, Naviera Multinacional del Caribe S.A., (Namucar) calle 7 y 9 Avenida Segunda, apartado 10095, San José, Costa Rica (Panamanian Company).
3. *Lugansk*, Novorossiysk Shipping Co., Ul Svobody 1, 353900 Novorossiysk, USSR.
4. *Iver Chaser*, Chaser Shipping Corp., Liberian Registration, Iver Bugge (Manager), Storgaten 52, postboks 160, 3251 Larvik, Norway.
5. *Homin*, no listing.
6. *Terushio Maru*, Nagashiki Kisen KK., 2886, Konoshima-Sotoura, Kasaoka, Okayama Prefecture, 714-2 Japan."

156. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

16 October 1985.

I have the honour to acknowledge receipt with thanks of Your Excellency's letter dated 15 October 1985, and received in the Registry the same day, concerning replies to questions put by Members of the Court during the oral proceedings in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*).

It is noted that at the foot of page 2 of your letter, and in paragraph 3 on page 3, there are incomplete references to the verbatim records of the hearings; no doubt you will complete these as soon as possible.

157. THE REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA

16 October 1985.

I have the honour to transmit to you herewith a copy of a letter dated 15 October 1985, and received in the Registry the same day, from the Agent of Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), concerning replies to questions put by Members of the Court during the oral proceedings in that case.

158. THE AGENT OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

18 October 1985.

I have the honour to refer to your letter dated 16 October 1985 in which you note that there are incomplete references to the verbatim record of the hearings in my letter containing replies to questions put by Members of the Court during the oral proceedings in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*).

In this connection, please note:

Paragraph 2 of the answer to Judge Ruda should read:

> "2. In its Memorial on the merits, filed 30 April 1985, and in its oral pleadings, Nicaragua did not refer specifically to its claims under these two conventions. However, Nicaragua has not abandoned these claims."

From paragraph 3 of the answer to Judge Ruda, two citations are missing. The first reference should be to CR 85/26, pp. 24-26. The second reference should be to CR 85/26, p. 26[1].

159. THE DEPUTY-REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA

22 October 1985.

Further to my letter of 16 October 1985, with which I transmitted to you a copy of a letter dated 15 October 1985 from the Agent of Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, I now have the honour to send you herewith a copy of a further letter from the Nicaraguan Agent, dated 18 October 1985, concerning missing references in the previous letter.

160. THE AGENT OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

26 November 1985.

I have the honour to transmit to the Court the answers of the Government of Nicaragua to the questions put by Judge Schwebel and transmitted to me as Agent for the Government of Nicaragua, under cover of your letter of 14 October 1985.

ANSWERS TO QUESTION 1

1.1. Melida Anaya Montes and Cayetano Carpio died in Nicaragua.

1.2. Melida Anaya Montes was the victim of homicide on 6 April 1983; the perpetrators were captured, tried before the Nicaraguan courts, convicted, and sentenced on 10 September 1985. Cayetano Carpio died by suicide on 12 April 1983.

ANSWERS TO QUESTION 2

2.1. Melida Anaya Montes arrived in Nicaragua as a refugee approximately one month before her death; she did not establish residence in Nicaragua and there is no record of her occupation while in Nicaragua. Cayetano Carpio arrived in Nicaragua after Melida Anaya Montes' death in order to attend her funeral; he did not establish residence in Nicaragua and he had no occupation during the few days he was in Nicaragua.

2.2. Melida Anaya Montes and Cayetano Carpio were associated with the insurgency in El Salvador.

2.3. There is not now and there never was a building or headquarters in Nicaragua for Salvadoran insurgents, hence neither Melida Anaya Montes nor Cayetano Carpio occupied or worked at or out of such a building or headquarters.

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[1] Pp. 184-185, *supra*.

ANSWER TO QUESTION 3

There is no contradiction between, and hence no need to reconcile, the position of the Nicaraguan Government set forth at CR 85/27, page 75 and CR 85/24, page 44[1] and Nicaragua's answers to Questions 1 and 2. (I must note that Judge Schwebel's reference, in his third question, to CR 85/24, page 44, is actually a reference to his own earlier remarks and not to any position expressed by the Government of Nicaragua.)

As the Government of Nicaragua has consistently stated, it has never supplied arms or other material assistance to insurgents in El Salvador or sanctioned the use of its territory for such purpose, it has never permitted Salvadoran insurgents to establish a headquarters or operations base or command and control facility in Nicaraguan territory and has never permitted its territory to be used for training of Salvadoran insurgents. The Government of Nicaragua has permitted, and continues to permit, Salvadoran refugees whether or not they are associated with the insurgency in that country, to enter Nicaraguan territory and to remain there as long as they obey Nicaraguan laws.

Nicaragua is not the only country that allows Salvadorans who may be associated with the insurgency there to enter its territory; other such countries include France, Spain, Ecuador, Costa Rica, Mexico, Panama and the United States. Indeed, as shown in the attached exchange of correspondence between Mr. Paul S. Reichler, one of Nicaragua's counsel in this case, and Mr. Francisco Altschul, the representative of the Salvadoran insurgency in Washington, D.C., the Salvadoran insurgency maintains formal offices in San Jose, Costa Rica, and Mexico City, Mexico (their addresses are in Mr. Altschul's letter) and maintains official representatives in Paris, Madrid and Quito in addition to Washington. Beyond this, Dr. Guillermo Ungo, President of the Frente Democratico Revolucionario, resides in Panama. Hector Oqueli, a member of the political/diplomatic commission of the same insurgent organization resides in Mexico. Ruben Zamora, also a member of that commission, is married to a Nicaraguan, and resides in Managua. Dr. Ungo was an invited guest at the inauguration of President Alan Garcia of Peru in 1985, and has traveled widely in South America and Europe, as well as the United States. In fact, Dr. Ungo, Mr. Oqueli and Mr. Zamora have visited the United States regularly since 1981 and have held meetings with members of Congress, given press conferences and interviews and spoken at public gatherings in the United States. Thus, it would appear that senior representatives of the Salvadoran insurgency have spent more time, and undertaken more political activity, in the United States than in Nicaragua.

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6 November 1985.

Mr. Francisco Altschul,
P.O. Box 11452,
Cleveland Park Station,
Washington, D.C. 20008.

Dear Mr. Altschul:

I am writing to you in your capacity as representative of the Frente Democratico Revolucionario/Frente Farabundo Marti de Liberacion Nacional (FDR/FMLN).

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[1] Pp. 237, 123, *supra*.

I would like to know the countries in which the FDR FMLN maintains offices and representatives, and the addresses of same. I would also like to know the countries where the FDR FMLN leadership resides, if other than El Salvador, and whether (and, if so, when) such leaders have visited the United States and other countries.

I wish to advise you that I serve as counsel to the Government of Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, now pending in the International Court of Justice, and that the information you furnish me, if any, may be submitted to the Court.

(*Signed*) Paul S. REICHLER.

Mr. Paul S. Reichler,
Reichler & Appelbaum,
888 17th St., NW,
Suite 1101,
Washington, D.C. 20006.

Dear Mr. Reichler :

This is in response to your letter of November 6, 1985.

The following information is public information and you may use it however you like.

The FDR FMLN maintains offices in Mexico City (Apartado Postal S-660, 06500, Mexico, D.F.) and San José (Apartado Postal 583, Codigo 1002, San Jose, Costa Rica). We also have representatives in Paris, Madrid and Quito.

Three of our leaders are now living abroad. They are Dr. Guillermo Ungo, President of the F.D.R., who lives in Panama, and two members of the political diplomatic commission, Hector Oqueli and Ruben Zamora, who live in Mexico and Nicaragua respectively. Mr. Zamora's wife is a Nicaraguan citizen.

All three of these men have visited the United States regularly since 1981. They have met with members of the Congress, and held press conferences and interviews. They have spoken at universities, to solidarity groups, etc. Dr. Ungo met with the Kissinger Commission in Washington in 1983. Other leaders from El Salvador have also visited the United States, as in November 1984 when Salvador Samayoa and Oscar Aceredo participated in a televised debate held in California and later traveled to Washington.

Our leaders have traveled to many other countries too, especially Dr. Ungo who has been to many South American and European countries. This year he was an invited guest at the inauguration of Alan Garcia as President of Peru.

I hope this answers your questions.

(*Signed*) Francisco ALTSCHUL.

161. THE AGENT OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

26 November 1985.

I have the honour to refer to your letter of 14 October 1985 (No. 74798), communicating to me, as Agent of the Republic of Nicaragua, the Court's request for additional documents in the case concerning *Military and Paramilitary Activities in and against Nicaragua*. Following is my Government's response:

1. The Court's first request was for the communication of 12 July 1979 from the Provisional Government of National Reconstruction to the Organization of American States, together with the annexes that accompanied such communication.

The communication is enclosed herewith, both in its original Spanish text[1] and in an English translation prepared by the O.A.S.

There were four annexes to the communication, which are listed on the last page of that document. A copy of the first annex, the Resolution of the XVII Meeting of Consultation of Ministers of Foreign Affairs of the O.A.S., is also enclosed herewith[2]. Copies of the other three annexes (the proposed Law of Guarantees, Organic Law and Program of the Government of National Reconstruction) could not be located, despite diligent search, either in Nicaragua or at the O.A.S. However, in lieu of these annexes, I am enclosing herewith the final versions of these three measures as they were enacted into law on 20 July 1979 and 21 August 1979[2]. (As enacted, these laws were called programs of the Government, Fundamental Statute of the Republic and Statute Regarding Rights and Guarantees of the Nicaraguan People.)

Because I served as Legal Adviser to the Junta de Gobierno, which wielded executive power during that period, I can affirm to the Court that there were no substantial differences between the proposed laws annexed to the communication to the O.A.S. and the ones enacted into law shortly thereafter.

2. The Court's second request was for contemporary memoranda or records of supposed conversations in Managua at the end of 1980 between the Nicaraguan Head of State and the Minister of Foreign Affairs and the United States Deputy Assistant of State for Central American Affairs, "on the subject of aid given, according to the United States, to the opponents of the Government of El Salvador".

There were no such conversations. Accordingly, there are no documents that fit the Court's description. Nevertheless, my Government has asked me to submit the following documents in an effort to assist the Court:

A. PRESIDENTIAL DETERMINATION NO. 80-26, 12 SEPTEMBER 1980, SIGNED BY PRESIDENT JIMMY CARTER

In this official determination, President Carter formally certified "on the basis of an evaluation of the available evidence, that the Government of Nicaragua has not cooperated with or harbors any international terrorist organization or is aiding, abetting, or supporting acts of violence or terrorism in other countries". The official press communique issued by the Office of the White House Press Secretary (also enclosed herewith) explains that:

> "The certification is based upon a careful consideration and evaluation of all the relevant evidence provided by the intelligence community and by our Embassies in the field. It also takes into account the Government of Nicaragua's repeated assurances that it is not involved with international terrorism or supporting violence or terrorism in other countries. Our intelligence agencies as well as our Embassies in Nicaragua and neighboring

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[1] Spanish text not reproduced.

[2] Not reproduced.

> countries were fully consulted, and the diverse information and opinions from all sources were carefully weighed."[1]

To the extent that the Court's request reflects an interest in the views of the United States Government at the end of 1980 concerning supposed support by Nicaragua to El Salvadoran opposition forces, the time period and subject matter specified in your letter of 14 October 1985, my Government trusts that the Court will find the aforementioned documents useful.

B. REPORT OF MEETING BETWEEN THOMAS ENDERS AND COMMANDER OF THE REVOLUTION DANIEL ORTEGA SAAVEDRA, 12 AUGUST 1981

This is an internal report of the Nicaraguan Government relating what transpired at a meeting between Commander Daniel Ortega Saavedra, then the Co-ordinator of the Junta de Gobierno, and Thomas Enders, then the U.S. Assistant Secretary of State for Interamerican Affairs. The meeting took place in Managua on 12 August 1981, and it covered a number of topics having to do with relations between Nicaragua and the United States. The report is not a public document. However, Nicaragua has no objection if the Court wishes to make it public, and leaves it to the Court to determine how the report should be treated.

It should be noted that the report of the meeting between Commander Ortega and Mr. Enders corroborates and confirms the evidence and testimony already presented to the Court by Nicaragua on the subject of the supposed supplying of arms to El Salvadoran insurgents.

To briefly summarize that testimony and evidence, the Government of Nicaragua has never supplied arms or other war material to El Salvadoran insurgents or authorized the use of Nicaraguan territory for such purpose. This does not mean that persons sympathetic to the insurgents have not, without the approval of the Nicaraguan Government and contrary to its policy, sent small quantities of arms from or through Nicaraguan territory to the insurgents; however, the Nicaraguan Government has acted diligently to prevent and stop such arms trafficking to the best of its ability. The testimony of Mr. David MacMichael, a former C.I.A. official called as a witness by Nicaragua, was that some arms shipments to El Salvadoran insurgents emanated from Nicaraguan territory at the very beginning of 1981, but that these shipments ceased, and did not resume, after March 1981. He saw no evidence of any other shipments between April 1981 and April 1983, when his employment with the C.I.A. ended. Mr. MacMichael testified that the evidence "did not establish" that the Nicaraguan Government was responsible for the arms shipments at the very beginning of 1981, and Nicaraguan Government witnesses have told the Court that the Government had no involvement or responsibility as regards those or any other shipments. (See, e.g., CR 85/21, pp. 13-14, 20-21, 25-26.)

At the meeting of 12 August 1981, according to the report, Commander Ortega told Mr. Enders (p. 6) that the Junta de Gobierno (which exercised executive power in Nicaragua from 19 July 1979 to 10 January 1985) and the National Directorate of the Frente Sandinista de Liberacion Nacional (the highest organ of Nicaragua's ruling political party) had decided not to permit any supply of arms from Nicaragua to El Salvadoran insurgents. Commander Ortega also stated (*id.*) that based on information about certain arms shipments provided by the United States Government to the Nicaraguan Government in March

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[1] Pp. 51-52, 54-55, 58, *supra*.

1981, the Nicaraguan Government took action immediately to curtail and prevent these activities and they were, in fact, curtailed and prevented.

Mr. Enders acknowledged (p. 3) that the Nicaraguan Government, upon receiving the information from the United States about the arms shipments, took action to stop them and did stop them, in March 1981. This, of course, corroborates Mr. MacMichael's testimony that the arms shipments at the very beginning of 1981 stopped as of March 1981. What is newly provided by the report is that the Nicaraguan Government intervened to stop the arms shipments and did so after evidence of the shipments was furnished to it by the United States Government.

According to the report, Mr. Enders suggested to Commander Ortega that sometime later arms shipments from Nicaraguan territory to El Salvadoran insurgents resumed. The report does not record Mr. Enders as providing any specific information as to date, place, quantity, persons responsible, means of shipment, etc. The report does show, however, that Commander Ortega asked for this information and told Mr. Enders that if the United States Government once again furnished Nicaragua with evidence of arms shipments, the Nicaraguan Government would again take the necessary steps to stop it. "We would ask you to give us reports about that flow to help us control it", Commander Ortega said (p. 6). Mr. Enders refused to provide any further information of this type even though similar information was provided five months earlier, saying (*id.*): "we are not in conditions to provide you intelligence reports, we would compromise our sources and our nations have not arrived at the necessary level to exchange intelligence reports".

It is Nicaragua's position that no information about arms shipments to El Salvadoran insurgents after March 1981 could have been furnished because no such shipments were made. That is confirmed by Mr. MacMichael. Based on his review of all the relevant information and reports collected by the United States Government, Mr. MacMichael testified that there was no evidence of arms shipments after March 1981.

3. The Court's third request was for the draft treaties submitted by the Government of Nicaragua to the Government of the United States on 20 October 1983. Please be advised that Nicaragua submitted these documents to the Court on 25 April 1984, as Nicaragua's Exhibit IX[1] in connection with the hearings on interim measures of protection. No copy of the letter of transmittal to the U.S. Department of State could be located, despite diligent search.

I trust that the foregoing and the enclosed documents constitute a satisfactory response to the Court's requests.

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16 July 1979.

Because of the great significance of the matter dealt with, and because the issue was recently considered by the XVII Meeting of Consultation of Ministers of Foreign Affairs within whose jurisdiction it still falls, the Secretary General of the Organization of American States begs to forward to the Representative with his compliments the message he has received from the "Junta of the Government of National Reconstruction" of Nicaragua, the text of which is self-explanatory.

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[1] I, pp. 217-249.

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12 July 1979

Mr. Secretary General:

We are pleased to make available to you, and to the ministers of foreign affairs of the Member States of the Organization, the document containing our "plan to secure peace" in our heroic, long-suffering country at the moment when the people of Nicaragua has consolidated its political and military victory over the dictatorship.

We have developed this plan on the basis of the Resolution of the XVII Meeting of Consultation on June 23, 1979, a Resolution that was historic in every sense of the word. It demands the immediate replacement of the genocidal Somoza dictatorship, which is now nearing its end, and backs the installation of a broadly representative democratic government in our country, such as the one we have formed. While saying that "the solution of the serious problem is exclusively within the jurisdiction of the people of Nicaragua", it appeals to hemispheric solidarity to preserve our people's right to self-determination.

We are presenting to the community of nations of the hemisphere in connection with our "plan to secure peace" the goals that have inspired our government ever since it was formed. They have been set forth in our documents and political declarations, and we wish to ratify some of them here:

I. Our firm intention to establish full observance of human rights in our country in accordance with the United Nations Universal Declaration of the Rights of Man and the Charter on Human Rights of the OAS. Our observance of human rights has already been made plain by the way the Sandinista National Liberation Front has treated hundreds of prisoners of war. Our government thus invites the Inter-American Commission on Human Rights (CIDH) to visit our country as soon as we are installed in our national territory.

II. Our wish that our installation in Nicaragua come about through a peaceful and orderly transition. The Government of National Reconstruction would take it as a gesture of solidarity if the foreign ministers of the hemisphere were to visit our country, and we hereby extend them a fraternal invitation to do so.

III. Our decision to enforce civil justice in our country and to try those incriminated of crimes against our people according to the regular laws. By their heroic struggle, the people have won themselves the right to let justice prevail for the first time in half a century, and will do so within the framework of the law, without a spirit of vengeance and without indiscriminate reprisals.

IV. Those collaborators with the regime that may wish to leave the country and that are not responsible for the genocide we have suffered or for other serious crimes that demand trial by the civil courts, may do so with all the necessary guarantees, which the Government of National Reconstruction authorizes as of now. The departure of these persons may be supervised by the Inter-American Commission on Human Rights and by the International Red Cross.

V. The plan to call the first free elections our country has known in this century, so that Nicaraguans can elect their representatives to the city councils and to a constituent assembly, and later elect the country's highest authorities.

Mr. Secretary General, it is now up to the governments of the hemisphere to speak, so that the solidarity with the struggle our people has carried forward to make democracy and justice possible in Nicaragua can become fully effective.

We ask that you transmit the text of this letter to the foreign ministers of the OAS.

Yours most respectfully,

Junta of the Government of National Reconstruction

Violeta de Chamorro Sergio Ramirez Mercado Alfonso Robelo Callejas
Daniel Ortega Saavedra Moises Hassan Morales.

Plan of the Government of National Reconstruction to secure peace:

We began on the basis that while it is true that the solution of the serious problem is exclusively within the jurisdiction of the people of Nicaragua, that hemispheric solidarity that is vital if this plan is to be carried out will come about in fulfillment of the Resolution of the XVII Meeting of Consultation of Ministers of Foreign Affairs of the OAS adopted on June 23, 1979.

The following steps will ensure the immediate and definitive replacement of the Somoza regime, which has already been defeated by the heroic fighting people of Nicaragua and their vanguard, the Sandinista National Liberation Front. Rejection of this plan for a political solution would leave the military annihilation of the Somoza regime as the only way out. This could go on for a few more weeks, and would cause unnecessarily many more deaths and much more destruction.

The stages of the plan:

I. Somoza submits his resignation to his Congress. His Congress accepts it and turns power over to the Government of National Reconstruction in recognition of the backing it has received from all sectors of Nicaraguan society.

II. Installation of the Government of National Reconstruction. This government is formed of representatives of all sectors of Nicaraguan politics, and has received the official support of all of them.

III. Immediately following the Government of National Reconstruction's installation inside Nicaragua, the member States of the OAS, particularly those that sponsored or voted in favor of the Resolution, will proceed officially to recognize it as the legitimate government of Nicaragua.

IV. The Government of National Reconstruction will immediately proceed to:

1. Abolish the Somoza constitution.

2. Decree the fundamental statute by which the Government of National Reconstruction will be provisionally governed.

3. Dissolve the National Congress.

4. Order the National Guard to cease hostilities and to return immediately to their barracks, with guarantees that their lives and other rights be respected. Those officers, non-commissioned officers and ranks of the National Guard that wish to do so may join the new national army, or they may return to civilian life. The Sandinista Army will enforce the ceasefire to facilitate compliance with these decisions, standing in place in the positions gained up to the moment the decree is issued.

5. Maintain order using those sectors of the National Guard that have observed the ceasefire and that are appointed to these duties by the Govern-

ment of National Reconstruction. They will work alongside soldiers of the Sandinista Army.

6. Decree the organic law that will govern the institutions of the State.

7. Implement the program of the Government of National Reconstruction.

8. Guarantee the departure from the country of all those soldiers, Somoza officials who wish to leave and who are not involved in serious crimes against the people.

Appendix I Resolution of the XVII Meeting of Consultation of Ministers of Foreign Affairs of the OAS.
Appendix II Law of Guarantees.
Appendix III Organic Law.
Appendix IV Program of the Government of National Reconstruction.

"Resolution II (approved at the seventh plenary session, held on June 23, 1979):

Whereas: the people of Nicaragua are suffering the horrors of a fierce armed conflict that is causing grave hardships and loss of life, and has thrown the country into a serious political, social, and economic upheaval, the inhumane conduct of the dictatorial régime governing the country, as evidenced by the report of the Inter-American Commission on Human Rights, is the fundamental cause of the dramatic situation faced by the Nicaraguan people and the spirit of solidarity that guides hemisphere relations places an unavoidable obligation on the American countries to exert every effort within their power, to put an end to the bloodshed and to avoid the prolongation of this conflict which is disrupting the peace of the hemisphere.

The seventeenth meeting of consultation of ministers of foreign affairs, declares:

> "that the solution of the serious problem is exclusively within the jurisdiction of the people of Nicaragua. That in the view of the seventeenth meeting of consultation of ministers of foreign affairs this solution should be arrived at on the basis of the following:
>
> 1. Immediate and definitive replacement of the Somoza régime.
>
> 2. Installation in Nicaraguan territory of a democratic government, the composition of which should include the principal representative groups which oppose the Somoza régime and which reflects the free will of the people of Nicaragua.
>
> 3. Guarantee of the respect for human rights of all Nicaraguans without exception.
>
> 4. The holding of free elections as soon as possible, that will lead to the establishment of a truly democratic government that guarantees peace, freedom, and justice.
>
> Resolves:
>
> 1. To urge the member States to take steps that are within their reach to facilitate an enduring and peaceful solution of the Nicaraguan problem on the bases set forth above, scrupulously respecting the principle of non-intervention and abstaining from any action that might be in conflict with the above bases or be incompatible with a peaceful and enduring solution to the problem.

2. To commit their efforts to promote humanitarian assistance to the people of Nicaragua and to contribute to the social and economic recovery of the country.

3. To keep the seventeenth meeting of consultation of ministers of foreign affairs open while the present situation continues."

Résolution II (adoptée à la septième séance plénière tenue le 23 juin 1979)

la dix-septième réunion de consultation des ministres des relations extérieures,

considérant :

Que le peuple nicaraguayen connaît actuellement les horreurs d'une cruelle lutte armée qui cause des souffrances immenses, des pertes de vies et a conduit le pays à des convulsions politiques, sociales et économiques; que le comportement inhumain du régime dictatorial qui gouverne le Nicaragua, mis en pleine lumière dans un rapport de la commission interaméricaine des droits de l'homme, est la cause fondamentale de la tragique situation que traverse le peuple nicaraguayen ; que l'esprit de solidarité qui inspire les relations continentales impose aux pays américains l'obligation inéluctable d'accomplir tous les efforts qu'ils peuvent pour arrêter l'effusion de sang, et éviter que la prolongation de ce conflit continue de perturber la paix du continent,

déclare :

qu'il appartient exclusivement au peuple nicaraguayen de résoudre ce grave problème ;

qu'à son avis cette solution doit reposer sur les bases suivantes :

1) remplacement immédiat et définitif du régime de Somoza ;

2) installation au Nicaragua d'un gouvernement démocratique dont la composition comprenne les principaux groupes de l'opposition au régime de Somoza, et soit librement choisi par le peuple nicaraguayen ;

3) garantie du respect des droits de l'homme de tous les Nicaraguayens sans exception ;

4) organisation dans les plus brefs délais d'élections libres conduisant à l'installation d'un gouvernement authentiquement démocratique qui garantisse la paix, la liberté et la justice ;

décide :

1. D'inviter instamment les Etats membres à prendre toutes les mesures en leur pouvoir pour faciliter une solution durable et pacifique du problème nicaraguayen dans les conditions susmentionnées en respectant scrupuleusement le principe de la non-intervention et en s'abstenant de toute action incompatible avec lesdites conditions, ainsi qu'avec la solution durable et pacifique du problème.

2. De s'engager à fournir les efforts requis pour fournir l'assistance humanitaire à la population, et pour contribuer au relèvement social et économique du pays.

3. Qu'elle restera en session aussi longtemps que la présente situation se prolongera.

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12 September 1980.

Memorandum for the Secretary of State

Subject: Certification and Determination under the Foreign Assistance Act of 1961, as Amended Regarding Assistance to Nicaragua

Pursuant to the authority vested in me by the Foreign Assistance Act of 1961, as amended (hereinafter "the Act"), I hereby:

(*a*) certify, pursuant to section 536 (*g*) of the Act* and on the basis of an evaluation of the available evidence, that the Government of Nicaragua "has not cooperated with or harbors any international terrorist organization or is aiding, abetting, or supporting acts of violence or terrorism in other countries";

(*b*) determine, pursuant to section 614 (*a*) of the Act, that the furnishing of not to exceed $45,000,000 in assistance to Nicaragua in the fiscal year 1980 from amounts appropriated under Chapter 4 of Part II of the Act for Egypt by the Supplemental Appropriations Act, 1979, is important to the security of the United States; and

(*c*) authorize the furnishing of such assistance to Nicaragua: *Provided*, That funds available for Egypt under Chapter 4 of Part II of the Act shall be reimbursed, in an amount equivalent to that furnished to Nicaragua hereunder, from funds appropriated for Nicaragua by the Supplemental Appropriations and Rescission Act, 1980, when such funds become available for obligation.

This determination shall be reported to the Congress immediately, and none of the funds provided for herein shall be furnished to Nicaragua until after such report has been made, as required by law.

This determination shall be published in the *Federal Register*.

(*Signed*) Jimmy Carter.

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12 September 1980.

The White House

As required by Section 536 (g) of the Foreign Assistance Act, the President is transmitting to the Congress a certification to release funds for aid to Nicaragua. The specific finding required by the law was that the Government of Nicaragua has "not cooperated with or harbors any international terrorist organization or is aiding, abetting or supporting acts of violence or terrorism in other countries".

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* The full text of section 536 (g) provides: "The President shall transmit to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate, certification prior to releasing any assistance to the Government of Nicaragua under this chapter, that the Government of Nicaragua has not cooperated with or harbors any international terrorist organization or is aiding, abetting, or supporting acts of violence or terrorism in other countries. In the event that the President transmits such a certification, but at a later date he determines that the Government of Nicaragua cooperates with or harbors any international terrorist organization or is aiding, abetting, or supporting acts of violence or terrorism in other countries, the President shall terminate assistance to the Government of Nicaragua under this chapter and the outstanding balance of any loan to the Government of Nicaragua, or any of its agencies or instrumentalities, with funds authorized to be appropriated by this chapter shall become immediately due and payable."

The certification is based upon a careful consideration and evaluation of all the relevant evidence provided by the intelligence community and by our Embassies in the field. It also takes into account the Government of Nicaragua's repeated assurances that it is not involved with international terrorism or supporting violence or terrorism in other countries. Our intelligence agencies as well as our Embassies in Nicaragua and neighboring countries were fully consulted, and the diverse information and opinions from all sources were carefully weighed. The conclusion was that the available evidence permits the President to make the certification required by Section 536 (g) of the Act.

This certification to the Congress permits the Administration to proceed with disbursement of economic assistance urgently required to further U.S. national interests in this critical area. The Administration does not intend to abandon the vital Central American region to Cuba and its radical Marxist allies. To the contrary, the assistance made available by the President's certification will enable us to give effective support to those moderate and democratic Nicaraguans who are struggling to preserve individual freedoms, political pluralism, the democratic process and a strong, free enterprise participation in their economy. Sixty per cent of the total $75 million in assistance will go to the private sector in Nicaragua.

* * *

Reporte de Reunión entre Thomas Enders y El Comandante de la Revolución Daniel Ortega Saavedra

Agosto 12, 1981

Enders: Muchas gracias por la acogida que se me ha dado, así como usted Comandante, como el Canciller y sus colegas; así como ustedes consideran a su Revolución irreversible, nosotros también la consideramos así. Nosotros no compartimos muchas ideas políticas y sociales, reconocemos sí que la derrota de Somoza es un hecho consumado y lo consideramos como tal y además como un hecho necesario.

Hablando con sus colegas y con la Junta de Gobierno hemos identificado tres problemas principales y otros menores; dos de ellos han sido elevados por Estados Unidos y uno por sus colegas.

Los tres problemas principales son los siguientes:

1. El continuo flujo de armas, municiones y otro tipo de apoyo militar a El Salvador.
2. El rápido desenvolvimiento del poder militar en Nicaragua, que de continuar sería una amenaza para sus vecinos, que podría dar como resultado una conflagración general de la cual Estados Unidos no podría sustraerse.
3. Temor de que los Estados Unidos están haciendo gestiones para desestabilizar la Revolución y atacarla.

En las platicas de ayer no pretendo haber llegado a un acuerdo; la pregunta que me hago: que si vale la pena hacer los esfuerzos necesarios para resolver estos problemas y programar una serie de pasos para resolverlos."

Estimo que debo detenerme en este punto pues sus colegas ya le habran informado sobre las conversaciones de ayer.

DOS. Vemos con optimismo su presencia en nuestro pais; y asi como la Revolución es una realidad, los Estados Unidos son tambien una enorme realidad.

La situación que vive el area, estamos claros que es muy dificil, muy critica y la Revolución Nicaraguense está interesada en ser un elemento estabilizador en el area. ¿Como lograr ese objetivo . . . ? Usted señalaba tres puntos en cuanto a problemas claves que ven los Estados Unidos y la Revolucion Nicaraguense; cuando hablamos de la desestabilización de la Revolución Nicaraguense no nos referimos solamente al hecho propio de nuestro pais, sino que tambien nos referimos a la actividad que de fuera a la Revolución Nicaraguense, los Estados Unidos ejercen directa o indirectamente en el area centroamericana.

Los campamentos de los guardias nacionales en territorio de Estados Unidos alientan las acciones contrarrevolucionarias en el resto del area en contra de Nicaragua, y esto tiene significado concreto en Nicaragua, hemos tenido mas de 100 muertos; un cambio de actitud de Estados Unidos conllevaria un cambio de actitud de los gobiernos de Centro America para con Nicaragua.

La preocupacion expuesta por usted en cuanto a El Salvador. A nosotros a tambien nos preocupa, por el mayor comprometimiento que tienen los Estados Unidos en El Salvador, sobre todo en el orden militar; Estados Unidos lo que ha hecho es fortalecer la posicion de los sectores mas conservadores de El Salvador; y existen contradicciones entre las Fuerzas Armadas, los empresarios y la Junta Salvadoreña; ahi no se ha fortalecido la Junta, sino la posicion mas conservadora, que hacen resistencia a la solución politica. Agregamos a esto, la presencia de 20 asesores norteamericanos en Honduras.

Todo esto, a un pais como el nuestro, que se siente incomprendido por los Estados Unidos, nos obliga a buscar mecanismos de defensa. Por eso consideramos de mucha trascendencia su venida a Nicaragua.

Somos revolucionarios, no estamos de acuerdo que se den actitudes de los Estados Unidos agresivas e imperialistas; no estamos de acuerdo que nos quieran invadir, que nos hayan invadido, que nos corten los créditos; pero buscamos si una mejor relación con Estados Unidos, a cambio de que nos dejen hacer nuestra Revolucion; no queremos entra a una carrera armamentista, pero las condiciones nos han obligado a hacerlo, sostenemos una posicion de no-alineamiento, queremos sostener esa posicion; no queremos convertirnos en una amenaza para lo que los Estados Unidos llaman "seguridad hemisferica"; pero para poder sobrevivir, esta Revolución tiene que buscar el respaldo de donde venga.

Queremos mantener el equilibrio de relación con paises de diferentes caracteristicas ideológicas, pero las decisiones que se toman en los Estados Unidos son determinantes para nosotros; tenemos toda la disposicion a buscar nosotros y ustedes, respuestas concretas y es necesario continuar este diálogo a todos los niveles que sea posible, para poder tener algo concreto y las relaciones que todos estamos deseando.

Enders. Quiero hacer un par de anotaciones y algunas propuestas concretas: Sobre El Salvador: nosotros no deseamos la restauracion de un orden conservador en El Salvador, a menos que sea a través de elecciones libres. Nos preocupa la Reforma Agraria y nos interesa que se lleve hasta su fin. En todas mis declaraciones he tratedo de manifestar eso. Creo que no obstante las dificultades, la Reforma Agraria puede seguir adelante. La fase segunda de dicha Reforma, que tiene que ver con las plantaciones de cafe de tamaño mediano tal vez deberia ser postergada. Es necesario el progreso social en El Salvador.

No objetamos su politica de no-alineamiento, tenemos relaciones con gran cantidad de paises que practican esa politica.

Yo siento que estamos en un gancho de camino, yo quisiera explorar conjuntamente con usted la manera en que nuestras relaciones futuras podrian desenvolverse. Quiero someterle algunas ideas que habria que hacer: *Por su parte*: que tomen las medidas necesarias para que el flujo de armas a El Salvador se detenga nuevamente *como en Marzo de este año*. No pretendemos immiscuirnos en la decision de como o con que se debe lograr ese objetivo, pero podemos hacer un monitoreo.

Nos gustaria que se atendiera el problema de la carrera armamentista en Centro America. Sobre esto, hay dos puntos importantes:

a) competencias de tener cada quien un mayor numero de personas enlistadas en el ejercito o en las milicias y

b) de competencia para ver quien tiene equipo mas moderno, tanques escorpiones en Honduras y T-55 en Nicaragua.

Nosotros podemos sugerir algunos métodos de componer esto; pero creemos que cada pais puede resolver esto, el número de soldados y de armas que cada uno debe tener.

Tengo ademas un problema que puede ser muy importante, pues involucra a los Sindicatos de los Estados Unidos que apoyan el programa de Reforma Agraria en El Salvador. El Instituto Americano de Sindicatos Libres tiene una oficina aqui, y ahorita tiene una controversia, y es importante que eso no perjudique nuestras relaciones.

Por nuestra parte:

1. Con respecto a la inseguridad de Nicaragua sobre posibles acciones de Estados Unidos en contra de Nicaragua, hago notar que ambos paises son signatarios del TIAR, que en su primer articulo dice: "Que obliga a los paises a no tomar recurso a las amenazas de uso de las fuerzas". Podria ser interesante el investigar la posibilidad de reafirmar en forma bilateral o a traves de otros mecanismos, este Tratado de Rio de Janeiro.
2. Debe poderse estudiar un poco mas el problema de los exiliados politicos nicaraguenses en Estados Unidos. Nosotros no tenemos el recurso legal para enjuiciarlos por participar en ejercicios militares, ademas nadie los ve alla como una amenaza real en contra de ustedes, pero es evidente que ustedes si los ven como una amenaza politica, el problema seria ver como nosotros podriamos dar respustas a este tema.
3. Cuando suspendimos nuestra asistencia economica, dijimos que podria restablecerse si Nicaragua paraba el flujo de armas al Salvador y aunque la situacion de los Estados Unidos ha cambiado, ese ofrecimiento sigue en pie.

Yo creo que en forma casi inmediata podriames investigar la ayuda alimentaria y para el desarrollo; y posteriormente, cuando los paises de la region se pongan de acuerdo, nosotros responderiamos a esa propuesta regional. Tambien creo seria interesante la posibilidad de asistencia tecnica a traves de jovenes tecnicos que vengan con el Cuerpo de Paz.

Lo que yo propongo es lo siguiente:

1. Que nos tomemos las próximas seis semanas, es decir, hasta finales de Septiembre, para ver si estas proposiciones pueden ser elaboradas.

2. En el interin, nos comprometemos a bajar un poco la retorica y esperamos que ustedes hagan lo mismo.
3. Nosotros iriamos presentando a ustedes las proposiciones y esperariamos de parte de ustedes las proposiciones que tengan a bien presentarnos.
4. Esperariamos que los próximas dos semanas ustedes tendrian la oportunidad de estudiar sobre nuestra primera propuesta.
5. En este tiempo nosotros esperariamos que se tomen las medidas para detener el flujo de armas al Salvador, yo propongo regresar a Nicaragua a fines de Septiembre para revisar el programa que se ha hecho y ver si las condiciones estan listas para irse a un nivel más alto.

Insisto que nosotros consideramos que estamos en un "gancho de camino" y si no tomamos estas medidas no vamos a lograr distensionar la situación. Creo que no es necesario explicar en detalle la alternativa pero quiero decir dos ideas: solamente hay dos cosas que a nosotros nos pueden involucrar militarmente en esta region: 1) que se resista a esta idea de hacer todo lo posible para detener el flujo de armas al Salvador. 2) que la carrera armamentista en Centro América se desarrolle hasta tal punto que algunos de sus vecinos en Centro America nos inviten a nosotros amparados en el TIAR. No tenemos nada que ganar en esta eventualidad, el costo seria demasiado-grande, pero si se nos empuja, la presente Administracion Americana está en condiciones de tomar una decision en esa situacion.

¿Como le gustaria a usted que procedieramos ...? ¿Debemos continuar explicando las ideas que exprese ...?

D.O.S. Nosotros tambien hemos contemplado las dos alternativas que usted expone y tambien hemos vista la encrucijada, nosotros tenemos la decision de defender esta revolucion por las fuerzas de las armas, aun cuando se nos aplaste y llevar la guerra a toda Centro America si eso sucede; estamos conscientes del poder militar de Estados Unidos, pero en ese aspecto somos romanticos, pero no suicidas y no queremos ese tipo de solucion. La propuesta que usted trae considero que esta dentro de un marco racional.

Hay algo que es importante y que se le hace dificil a los politicos norte-americanos de entender y es el proceso de cambio en America Latina. Los Estados Unidos estan viendo a Nicaragua como el elemento determinante que puede provocar una respuesta racional o no de parte de los Estados Unidos. Pienso que los Estados Unidos consideran que es el comportamiento de Nicaragua lo que determina que la reaccion de Estados Unidos sea racional o irracional, y el problema es la falta de comprension de parte de los Estados Unidos; porque la responsabilidad fundamental no es solamente el comportamiento de Nicaragua, sino el comportamiento de los Estados Unidos lo que determina nuestro comportamiento. Nicaragua, historicamente ha sido afectada por los Estados Unidos aun cuando no existia la Union Sovietica.

Tenemos un prejuicio histórico hacia los Estados Unidos, saliendo de los Estados Unidos una serie de actitudes que nos hacen temer agresiones de parte de ellos, eso nos hace buscar todos los mecanismos de defensa. A nosotros nos interesa que triunfe la guerrilla en El Salvador y en Guatemala cuando vemos que no hay una voluntad positiva de los Estados Unidos hacia nosotros. Por eso el peso mayor de esto lo tiene la politica de los Estados Unidos. Esta situacion no va a estar determinada por el comportamiento de Nicaragua, sino que va a depender del comportamiento de los Estados Unidos. Me pare que es necesario hacer un esfuerzo para explorar esas vias que usted denuncia.

Una cosa importante, por ejemplo, seria que ustedes ayudaran a traves de su influencia para que se produzca la reunion de Canciller de Centro America y despues la reunion de los Jefes de Estado, de todos los Cancilleres y de todos los Jefes de Estado sin excepcion y alli podria mos ir tocando estos puntos e ir bajando la tensión.

Nosotros estamos dispuesto a hacer todos los esfuerzos posibles para lograr un entendimiento con los Estados Unidos, pero eso va a estar determinado por la actitud de los Estados Unidos. Nosotros nos sentimos inseguros, pues hoy estamos hablando con el Sr. Enders, pero un señor embajador de los Estados Unidos en Colombia dijo otra cosa, y la Sra. Kirkpatrick habla por otro lado, etc. Necesitamos un canal responsable de comunicacion, necesitamos seriedad en las declaraciones y un canal consistente y que pos de confianza.

Seria muy positiva su venida en Septiembre y eso nos compromete a dar pasos practicos. Si los Estados Unidos, por ejemplo, pueden actua en contra de los campos de ex-guardias nacionales en su territorio, bajaria la presión de la carrera armamentista en Nicaragua. Los ex-guardias nacionales actuan en sus campamentos porque los Estados Unidos lo permiten, pues si fuesen guerrilleros guatemaltecos los que estuviesen alli, serian reprimidos inmediatamente. Nosotros mismos fuimos reprimidos en Estados Unidos por el FBI y sabemos de lo dificiel que es actuar cuando no hay disposicion politica de parte de los Estados Unidos; lo mas importante pues es la comprensión que los Estados Unidos tengan de toda esta problematica. Ya ve por ejemple se va Pezzullo y nosotros no sabemos si va a ver o no va a ver nuevo emabajador.

Enders. Hay un nuevo y valioso embajador para Nicaragua.

D.O.S. Tambien en Washington es necesario tener un buen canal de comunicacion.

Enders. Ustedes tienen un muy buen embajador.

En relación al asunto de la respon-abilidad, no pretendemos achacarles a ustedes la responsabilidad de la situación imperante; yo comprendo que un revolucion que recientemente ha triunfado-, se vera en la necesidad de armarse para defenderse y proteger a otros movimientos revolucionarios afines y por supuesto mas ventajosos que la lucha se de en otros paises y no en el de ustedes. El problema es que esta forma de proceder o este comportamiento no se convierta en un reto para los Estados Unidos que este tenga que responder, y esto es un circulo infernal del que hay que salirse. La propuestas que quisiera hacer tendrian que estar diseñadas a lograr evadir este problema, creo que si hemos de proceder, tenemos que bajar la retorica y proveernos de un canal solido de comunicacion.

Yo le propongo que para el mundo solo digan que nos hemos encontrado para no traten de caracterizar estas reuniones y solo hablemos del progreso en nuestras próximas reuniones.

Insisto en la importancia de que el flujo de armas al Salvador sea detenido, ya que si no, yo no podria sugerir a mi Gobierno que siguieramos el curso de lo que hemos conversado. Yo puedo estar seguro que haremos esfuerzos inmensos para explorar las ideas que les he expuesto y las proposiciones que ustedes hacen.

D.O.S. Sobre el flujo de armas al Salvador, hay que aclarar que en la medida en que hemos tenido informe de parte de ustedes se ha tratado de parar; quiero aclararle sin embargo que existe aqui gran simpatia de colaborar con el pueblo salvadoreño, incluso de parte de miembros de nuestras fuerzas armadas, sin embargo de parte de nuestra Junta de Gobierno y la Dirección Nacional existe la decisión de que no hay que permitir este tipo de actividades. Nosotros les pediriamos que nos de informes acerca de ese flujo para ayudarnos a nosotros a controlarlo.

Enders. Ustedes lo han logrado hacer antes y creo que lo pueden lograr ahora;

no estamos en condiciones de proporcionar a ustedes informes de Inteligencia pues comprometeriamos a nuestras fuentes y nuestras naciones no han llegado al nivel necesario para intercambiar informes de Inteligencia.

Quiero reafirmar de que nosotros somos personas serias, que nos ponemos condiciones imposibles o un juego diabólico en el que ustedes no pueden ganar.

DOS. En Marzo ustedes nos trasladaron informes, que fueron importantes para detener el flujo . . .

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162. THE AGENT OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

26 November 1985.

I have the honour to refer to your letter of 14 October 1985 (No. 74797), communicating to me, as Agent of the Republic of Nicaragua, the Court's request for additional documents in the case concerning *Military and Paramilitary Activities in and against Nicaragua*. Following is my Government's response.

1. The Court's first request was for the official texts of the Presidential Findings made by President Ronald Reagan on 9 March 1981, 1 December 1981 and 20 September 1983 concerning "covert activities" against Nicaragua by the Central Intelligence Agency and other official organs of the United States Government; in the absence of the official texts of the Presidential Findings, the Court requested "the most authoritative evidence thereof available".

The Government of Nicaragua is unable, for obvious reasons, to supply the Court with the official texts of these Presidential Findings. The Presidential Findings are highly classified, official documents of the United States Government. They are not publicly available, and access to them even within the United States Government is severely restricted. The Government of Nicaragua has never obtained — or sought to obtain — these or any other classified U.S. documents.

Nevertheless, by diligent examination of publicly available sources and materials Nicaragua was able to obtain authoritative and irrefutable evidence of the existence of these three Presidential Findings and their contents. All such evidence has already been submitted to the Court. To assist the Court, I will summarize this evidence herein.

To begin with, United States law provides that "covert activities" by United States intelligence agencies may only be undertaken in foreign countries when the President makes a formal finding that such activities are important to the United States' national security (22 *United States Code* (2422)); the finding must be communicated to the intelligence committees of the Senate and House of Representatives (50 *United States Code* (413)). The Presidential Finding is different from the President's actual authorization for the "covert activities" to take place. The authorization is normally contained in a National Security Decision Directive, which spells out the authorized activities and their objectives; this document is not necessarily disclosed to the Congressional Intelligence Committees. The Presidential Finding is the President's formal communication to these committees. In practice, it may or may not contain a complete and accurate description of the covert activities, their objectives and their justification; this depends on whether the President wishes to make a full or a partial disclosure to the committees regarding the activities he has authorized.

A. The Presidential Finding of 9 March 1981

The most authoritative source of the existence of this finding is an internal document of the United States National Security Council, prepared in April 1982, entitled "U.S. Policy in Central America and Cuba Through F.Y. [Fiscal year] '84, Summary Paper". The document was obtained by the *New York Times*, which published it on April 7, 1983. The document, as published in the *Times*, was submitted by Nicaragua to the Court as Annex C, Attachment III-1, to its Memorial of 30 April 1985. In relevant part, the document states:

> "Immediate steps are needed to implement an arms interdiction program in Guatemala as provided by the 9 March 1981 Presidential Finding on Central America. Decision: that the Central Intelligence Agency's authority under the 9 March 1981 Presidential Finding be increased from $19.5 million to $22.0 million in order that an expanded program in Guatemala be initiated this fiscal year. These funds should be obtained, if possible, from the C.I.A.'s Reserve for Contingencies."

Members of the Intelligence Committees of the Senate and House of Representatives cited the Presidential Finding of 9 March 1981 in the course of interviews with the *Washington Post*, reported on 8 May 1983, in which they traced the history of United States covert activities in and against Nicaragua up to that time. The Congressional sources advised the *Post* that:

> "In early March, 1981, within six weeks of Reagan's inauguration, CIA Director [William] Casey brought the intelligence committees a presidential 'finding' that secret operations in Central America were important to United States national security . . .
>
> The initial Reagan administration program was outlined to the committees in very general terms, centering on the protection of the Salvadoran government from the communist-supported insurgency there. Casey also portrayed the program as resulting from inquiries from neighboring countries, such as Honduras and Costa Rica, about help against the spread of revolution." (Annex F, No. 36, p. 68 (*Washington Post*, May 8, 1983). See also Annex F, No. 191, p. 293 (*Wall Street Journal*, March 5, 1985), which refers to "a March 1981 decision [that] authorized the agency [CIA] to develop a broad political-action effort in Latin America".)

The Presidential Finding of 9 March 1981 did *not* authorize or initiate the C.I.A.-directed campaign of military and paramilitary attacks in and against Nicaragua. That campaign was not authorized by President Reagan until November 1981, and the Presidential Finding on it was not issued until 1 December 1980. The 9 March 1981 Presidential Finding did, however, authorize the C.I.A. to engage in political activity against the Nicaraguan Government. Accordingly, subsequent to this finding the C.I.A. made contact and began to work with organizations of Nicaraguan exiles in Miami, and with the various armed bands of former members of the Guardia Nacional who were carrying out isolated acts of brigandry from small base camps in Honduras near the Nicaraguan border. (Supplemental Annex G, paras. 6-8.) The C.I.A. succeeded in unifying these diverse elements into a single political military organization, the Nicaraguan Democratic Force, which came into existence in August 1981. (*Id.*) As attested by Mr. Edgar Chamorro, who became a leading official of the organization, the charter of the organization was drafted by the C.I.A., the name was chosen by the C.I.A., and all of the directors were either named or approved by the C.I.A. (*Id.*)

B. THE PRESIDENTIAL FINDING OF 1 DECEMBER 1981

The Presidential Finding of 1 December 1981 followed by a few days President Reagan's formal authorization of a C.I.A.-directed campaign to foster insurgency against the Nicaraguan Government and to conduct military and paramilitary activities in and against Nicaragua. President Reagan's formal authorization was given by means of National Security Decision Directive 17, which adopted a plan prepared by the C.I.A. and submitted to the President on 16 November 1981 at a meeting of the National Security Council. The C.I.A. plan itself was subsequently obtained by the *Washington Post* and the *New York Times*, which published excerpts from it. One of these published accounts describes and quotes from the C.I.A. plan as follows:

> "The covert action proposal was developed by the CIA and first presented in detail to President Reagan by CIA Director William J. Casey at the Nov. 16 [1981] meeting of the National Security Council . . .
>
> According to highly classified NSC records, the initial CIA proposal in November called for 'support and conduct of political and paramilitary operations against the Cuban presence and Cuban-Sandinista support structure in Nicaragua and elsewhere in Central America'. The CIA, in seeking presidential authorization for the $19 million paramilitary force, emphasized that 'the program should not be confined to that funding level or to the 500-man force described', the records show.
>
> Covert operations under the CIA proposal, according to the NSC records, are intended to:
>
> 'Build popular support in Central America and Nicaragua for an opposition front that would be nationalistic, anti-Cuban and anti-Somoza.'
>
> 'Support the opposition front through formation and training of action teams to collect intelligence and engage in paramilitary and political operations in Nicaragua and elsewhere.'
>
> 'Work primarily through non-Americans' to achieve these Covert objectives, but in some cases the CIA might 'take unilateral paramilitary action . . . possibly using U.S. personnel . . . against special Cuban targets.'
>
> After the initial presentation, the CIA proposal was turned over to the national security planning group, a subcommittee of the NSC, as a draft 'presidential finding' which states the need for specific covert operations under national security statutes, no funds can be expended for covert actions 'until the president finds that each such operation is important to the national security of the United States'." (Annex F, No. 4, pp. 6-7 (*Washington Post*, March 10, 1982). See also Annex F, No. 3, pp. 3-5 (*Washington Post*, February 14, 1982); Annex F, No. 6, p. 9 (*New York Times*, March 11, 1982); Annex F, No. 23, pp. 46-49 (*Washington Post*, April 3, 1983).)

The existence and content of the C.I.A. plan, and the fact of its adoption by President Reagan in November 1981, were confirmed by Mr. David MacMichael, a former C.I.A. official called as a witness by Nicaragua at the oral hearings on the merits:

> "*Q.*: Now, as part of your official duties at that time in 1981, were you advised of a plan prepared for submission to the President of the United States calling for covert activities against Nicaragua?
>
> *A.*: Yes, I was.
>
> *Q.*: Can you tell us when and how you were advised of the plan?

A. The plan was discussed at a meeting of the Latin American Affairs Office which I attended in my capacity as a member of the analytic group early in the Fall of 1981.

Q. When you say Latin American Affairs Office, is that the Latin American Affairs Office of the Central Intelligence Agency?

A. Yes, it is.

Q. Do you know if the President ultimately approved this plan?

A. Yes he did.

Q. Was that the plan submitted to the House and Senate Intelligence Committees in November 1981?

A. Yes it was.

Q. You say you first heard of this plan at a meeting in the Latin American Affairs Office of the Agency in the Fall of 1981, could you tell us generally the outline of the plan as discussed in that meeting?

A. Well, as discussed the general premise of the plan was that Nicaragua was considered a menace to the security of the Central American region and that a covert force of approximately 1,500 men was to be organized to carry out military and paramilitary actions in Nicaragua." (P. 44, *supra*.)

Mr. MacMichael continued:

Q. Mr. MacMichael, you have described the plan in general terms. I would now like to read from a newspaper account in the *Washington Post* purporting to contain excerpts from the actual CIA proposal to the President. It is reprinted in Annex F, submitted with the Memorial (Item 4, pp. 6-7).

The newspaper account reads: 'According to highly classified NSC records the initial CIA proposal in November called for "support and conduct of political and paramilitary operations against the Cuban presence and Cuban-Sandinista support structures in Nicaragua and elsewhere in Central America". The CIA in seeking presidential authorization for the $19 million paramilitary force emphasized that "the programme should not be confined to that funding level or to the 500-man force described" the records show. Covert operations under the CIA proposal, according to the NSC records are intended to: "build popular support in Central America and Nicaragua for an opposition front that would be nationalistic anti-Cuban and anti-Somoza" the quotation continues: "support for the opposition front through formation and training of action teams to collect intelligence and engage in paramilitary and political operations in Nicaragua and elsewhere". "Work primarily through non-Americans" to achieve these covert objectives, but in some cases the CIA might take unilateral paramilitary action — possibly using United States personnel — against special Cuban targets.'

To your recollection, does that accurately describe the plan that was discussed at the meeting you attended?

A. Yes, it does. I do not in all honesty recall the emphasis or any discussion there of the possible unilateral use of United States forces or personnel against Cuban targets, but the rest of it squares very well with my recollection." (Pp. 49-50, *supra*.)

The Presidential Finding on activities called for in the C.I.A.'s plan and authorized by President Reagan was made and sent to the Congressional intelligence committees on 1 December 1981. This is confirmed by the public statement of U.S. Representative Edward P. Boland, who was then Chairman of the Intelligence Committee of the House of Representatives:

> "This committee has fulfilled its responsibility to this House. When the first finding was made and sent to this committee on December 1, 1981, it was the kind of a finding that required, demanded, that this committee have updates on that finding." (Annex E, Attachment 10 (130 *Cong. Rec.* H2918, April 12, 1984).)

An official Report of the Intelligence Committee of the House of Representatives, dated 13 May 1983, confirms the timing of the Presidential Finding and its content:

> "From the Committee's first briefing, in December, 1981, on the program to support anti-Sandinista insurgency, serious concerns were expressed by members of the Committee. These concerns went to the number and tactics of the insurgents to be supported, whether these insurgents would be under U.S. control and the possibility of military clashes between Nicaragua and Honduras." (Annex E, Attachment 1 (Report of the U.S. House of Representatives Permanent Select Committee on Intelligence, 98th Congress, 1st Session, Rept. No. 98-122, Part I, p. 7 (May 13, 1983).)

Finally, newspaper accounts derived from official sources have also confirmed the 1 December 1981 finding. For example, the *New York Times* of 14 March 1982, which obtained a copy of the Presidential Finding, reported that:

> "One of the items made available [to the *Times*] was a document signed by President Reagan on Dec. 1, 1981, asserting the need for a covert intelligence operation in the region. By law, the President has to sign such a document, called a finding, for all covert actions.
>
> The document grants the CIA a broad authorization to support and conduct political and paramilitary operations against Cubans and Cuban supply lines in Nicaragua and elsewhere in Central America. It further authorizes the CIA to work with other governments." (Annex F, No. 8, p. 11 (*New York Times*, March 14, 1982).)

Other newspaper accounts of the Presidential Finding of 1 December 1981, based on official sources, are part of the record of this case as: Annex F, No. 36, page 69 (*Washington Post*, May 8, 1983); Annex F, No. 13, page 23 (*Newsweek*, November 8, 1982); Annex F, No. 187, pages 282-283 (*Los Angeles Times*, March 3, 1985).

C. The Presidential Finding of 20 September 1983

On 6 May 1983, the Senate Intelligence Committee voted to authorize and fund continued covert paramilitary action in Nicaragua during the next fiscal year, beginning 1 October 1983, only upon formulation of a new Presidential Finding. Senator Barry Goldwater, the Committee's Chairman, confirmed this in later Senate debates:

> "On May 6, 1983, the Intelligence Committee voted 13 to 2 to authorize and fund a covert paramilitary action program directed against the Sandinista regime subject to certain conditions stipulated by the committee. The Committee placed all funds requested by the President for fiscal year 1984 into the reserve for contingencies for the purpose of supporting a redirected, redefined covert paramilitary action program based upon formulation of a new Presidential finding . . .
>
> Some of my colleagues may recall that at the time we asked the president to come up with a new program on the whole of Central America before

> September 30, 1983." (Annex E, Attachment 6 (130 *Cong. Rec.* S3766, April 4, 1984).)

Senator Goldwater also confirmed this in a 27 June 1983 letter to the Director of the Congressional Research Service. (Annex E, Attachment 2 (Letter from Senator Goldwater to Mr. Gilbert Gude, Director, Congressional Research Service, The Library of Congress, June 27, 1983, with attachment).)

In July 1983, senior administration officials and Congressional sources confirmed that the administration had begun preparing the new finding, which called for expanded paramilitary action in Nicaragua. (Annex F, No. 43, pp. 81-83 (*Washington Post*, July 27, 1983); Annex F, No. 42, pp. 79-80 (*New York Times*, July 25, 1983).)

Senator Goldwater later informed his Senate colleagues that on 20 September 1983 the new finding had been submitted to the Senate Intelligence Committee, and the Committee met on that date to consider it. He said:

> "The committee subsequently met on September 20, 1983, to consider the new Presidential finding on Nicaragua. Witnesses at the hearing included Secretary of State Shultz, the Director of Central Intelligence, Casey, and the Assistant Chairman of the Joint Chiefs of Staff. The committee met again on September 21; and, after careful consideration, the committee agreed overwhelmingly to approve the covert paramilitary action program for Nicaragua." (Annex E, Attachment 6 (130 *Cong. Rec.* S3766, April 4, 1984).)

Congressional sources had also confirmed the committee's September 20 meeting on the new finding to the *Wall Street Journal*, which reported on 21 September 1983 that:

> "The Reagan administration sketched out a revised blueprint for covert activities in Nicaragua that appears likely to win the backing of the Senate Intelligence Committee.
>
> Secretary of State George Shultz and Central Intelligence Agency Director William Casey yesterday appeared at a closed committee session to deliver the new plan, known as an intelligence 'finding'.
>
> Congressional sources said the finding expands the administration's originally stated goals of the Nicaraguan operation, although the expansion doesn't go as far as some administration officials had wanted.
>
> The new finding, the sources said, declares that the U.S. intends to support insurgents opposed to Nicaragua's leftist government until Nicaragua quits backing revolutionary movements elsewhere in Central America. This goal is broader than the one the Reagan administration originally stated two years ago, when it said it would support Nicaraguan insurgents because they could help cut off arms flowing from Nicaragua to leftist rebels in El Salvador.
>
> But the CIA has been considering expanding its official goals even further, in the new finding. Officials had considered declaring that the Nicaraguan operation is intended to force fundamental changes in the overall policies of the Nicaraguan government." (Annex F, No. 47, p. 88 (*Wall Street Journal*, September 21, 1983).)

Representative Edward P. Boland, Chairman of the House Intelligence Committee, described the Presidential Finding of 20 September 1983 during a debate in the House of Representatives on 20 October 1983:

> "[T]he administration has reformulated its position on the war in

> Nicaragua in a new Presidential finding. The finding authorizes the continuation of the present program. The scope of activities which are authorized is very broad, and in no way limited to arms interdiction. It includes keeping the military pressure on the Sandinistas. Its bottom line is the continuation of the war.
>
> The finding makes no mention of overthrowing the Government of Nicaragua, although it is the stated purpose of the Contras. And the administration is offering no guarantees.
>
> The new finding, then, is one more effort to defend the secret war in the Congress. While the finding contains more detail, it contains no new ideas or policies. It is a compendium of the symmetry arguments you heard and rejected in July. Make no mistake about it, military victory is the administration's bottom line. The statement of Under Secretary of Defense for Policy, Fred Ikle, on September 12, before the Baltimore Council on Foreign Affairs, clearly shows that there is a feeling in this administration that the Sandinistas must be defeated on the battlefield before the problems of Central America can be solved." (Annex E, Attachment 5 (129 *Cong. Rec.* H8390, October 20, 1983).)

Similarly, Representative Lee Hamilton, also a member (and now Chairman) of the House Intelligence Committee, said:

> "I think the most significant developments that have occurred since we met in July are two: One, we have a new finding submitted by the administration which considerably expands the purposes of that operation; and two, the war has in fact expanded." (Annex E, Attachment 5 (129 *Cong. Rec.* H8416, October 20, 1983).)

2. The Court's second request was for the official text of the communiqué issued by the Nicaraguan Ministry of Defence on 29 March 1984 pertaining to the mining of Nicaraguan ports. The original Spanish text [1] of the communiqué, as well as an English translation, are enclosed herewith.

I trust that the foregoing and the enclosed documents constitute a satisfactory response to the Court's requests.

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29 March 1984.

COMMUNIQUÉ NR 30

In response to the maneuvers of disinformation that the CIA and its agents have tried to spread that the explosive devices that have exploded in our ports are supposedly of artesanial manufacture and were placed by counter-revolutionary elements:

The Ministry of Defense reports:

1. That after the investigations carried out as a result of explosions caused by explosive devices on the merchant ship *Geopontes VI* on 1 March 1984, *Los Caribes* on 7 March 1984, *El Lugansk* on 23 March 1984, *El Inderchaser* on

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[1] Spanish text not reproduced.

28 March 1984, it is concluded that said explosive devices are mines of high sophistication, of industrial manufacture, emanating from the arsenals of the army of the United States and they are being placed by specialists of the CIA, by means of utilization of modern surface and underwater naval technique.

Managua.

Directorate of Public and External Relations of the Ministry of Defense.

163. THE REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA

6 December 1985.

I have the honour to send you herewith copies of the replies given by the Agent of Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* to questions put by Judge Schwebel as also certain information and documents requested by the Court following the hearing on the merits.

All these texts were handed to me by the Agent of Nicaragua on 26 November 1985, except for the enclosures mentioned at the foot of the first page of his letter No. 85-495, which I received from him yesterday.

164. THE MINISTER OF FOREIGN AFFAIRS A.I. OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

11 April 1986.

We refer to the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, in order to inform the Court of the following facts.

Nicaragua's Agent and Counsel in the case in referrence, H.E. Ambassador Carlos Argüello G., has been seriously threatened by representatives of the Government of the United States, both in the United States itself and in the Netherlands. These facts are described in a Memorandum sent by the Agent to the Minister of Foreign Affairs of which we annex a copy.

We consider these facts to be extremely serious because their purpose is to intimidate the participants in this case in order to influence or tarnish the cause of justice. Furthermore, the threats and illicit and immoral offers made to the Agent of Nicaragua, clearly indicate that Nicaragua's representatives, Counsel and Advocates, are in danger, directly or indirectly, from the Government of the United States.

The Government of Nicaragua requests that the Court take the necessary steps in order to insure the independent exercise of the duties of Nicaragua's Agent, Counsel and Advocates in accordance with Section 3 of Article 42 of the Statute of the Court.

Nicaragua understands that these steps include among others, the giving notice of these matters to the country of the seat of the Court, and making recommendations to be forwarded to the Secretary-General of the United Nations.

For its part, the Government of Nicaragua is taking all the measures it has available in order to safeguard the personal security and well being of the Agent and of his family.

Nicaragua has communicated to the Government of the United States, a note of protest for these immoral and criminal acts that jeopardize the cause of justice and endanger the life itself of human beings.

Furthermore, Nicaragua has given instructions that these matters be communicated to the Secretary-General of the United Nations, and also to the Government of the Netherlands, since Nicaragua's Agent is also Ambassador before that Government.

(*Signed*) Victor Hugo Tinoco.

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24 de Marzo de 1986.

Memorandum

Para: Padre Miguel D'Escoto
Ministro del Exterior
De: Carlos Argüello G.
Agente de Nicaragua ante la Corte Internacional de Justicia
Asunto: Denuncia

A finales del mes de Agosto de 1985, viajé de Nicaragua a los Estados Unidos con el propósito de reunirme con los abogados norteamericanos que forman parte del equipo legal de Nicaragua en el juicio contra los Estados Unidos ante la Corte Internacional.

En ese viaje aproveché la oportunidad de un fin de semana para visitar a mi hermano Federico Argüello quien reside en la ciudad de Miami.

Estando en esa ciudad fui abordado por individuos que se identificaron como empleados de la F.B.I. Uno de éllos me mostró una placa que lo identificaba como el Sr. Miranda, agente de la F.B.I.

Se meseñaló que la F.B.I. era una institución diferente a la C.I.A. y que por tanto yo no estaba tratando con la C.I.A.

El Sr. Miranda me indicó que sabian que mi hermano viviá en Miami pero que no me preocupara por su bienestar ó el de mis familiares en Estados Unidos. Me preguntó si necesitaba algo en los Estados Unidos pues él podria conseguirlo. En fin, que él podria conseguirme lo que yo deseara.

En la conversación el Sr. Miranda me manifestó el vivo interés que tenian altos funcionarios en Washington de hablar conmigo sobre el juicio ante la Corte Internacional. Asimismo, que al más alto nivel en el Consejo de Seguridad Nacional, deseaban hablar conmigo sobre la situación en mi país.

En las circunstancias del caso acepté, para fecha a fijarse en el futuro, una reunión con las personas que decia deseaban hablar conmigo.

En los meses siguientes, recibi varias llamadas telefónicas tratando de fijar fecha y lugar para una posterior reunión. Estas llamadas procedian aparentemente desde Miami y la invitación era para reunirme con el Sr. Miranda y otras personas.

La certeza sobre la proveniencia y verdadero sentido de la situación antes descrita quedó claramente establecido con los siguientes acontecimientos.

A mediados de enero de este año, econtrándome en un almuerzo en la ciudad de La Haya con la Srta. Nikki L. Hansen, Oficial Comercial con rango de

Segundo Secretario de la Embajada de los Estados Unidos en Holanda, ella me hizo entrega de una carta que me dijo debia leer y luego devolverle con repuesta.

En la carta, escrita en español, se hacia referencia a mi anterior reunión en el mes de agosto en Miami, reiteraba el interés que ellos tenian de reunirse conmigo pues podria ser muy provechoso y agregaba que no debia preocuparme por mis familiares en Estados Unidos.

En vista de las amenazas e insinuaciones de la carta, acepté la reunión demandada. Se fijó que ésta seria en la propia casa de la Srta. Hansen situada en La Haya en Bazarstraat 34, y me dió su teléfono privado en esa que es el número 654046.

Esta reunión tuvo lugar unos dias después. Al presentarme a la cita me encontre que mi interlocutor era el Sr. Lawrence M. Wright, Primer Secretario de la Embajada de los Estados Unidos en Holanda.

El Sr. Wright me repitió fundamentalmente el mensaje del Sr. Miranda en Miami.

Me habló del interés en Washington por reunirse conmigo y tratar asuntos relacionados con el juicio ante la Corte Internacional de Justicia. Esta demanda era acompañada de las ya repetidas amenazas contra mis familiares en Estados Unidos y particularmente en contra de mi hermano, junto con los ofrecimientos de que podia conseguirme lo que yo deseara.

Esta entrevista con un alto funcionario de la Embajada de los Estados Unidos, acreditado ante el Reino de los Paises Bajos y cuya identidad no era, por tanto, independientemente conocida, no dejaba duda que las amenazas y ofertas inmorales provenian del propio Gobierno de los Estados Unidos, es decir, de nuestra contraparte en el juicio ante la Corte Internacional de Justicia.

Lo delicado de la situación, tanto a nivel de riesgo personal y de mis familiares, asi como por el evidente interés en crear condiciones para un eventual desprestigio del cualquier fallo emitido por la Corte Internacional, me llevo a tratar de ganar tiempo aceptando una futura reunión fuera de La Haya, en fecha a determinarse con posterioridad y en la cual se pretendia estarian las personas que en Washington querian hablar conmigo.

Desde esa fecha, hasta mi regreso a Nicaragua en marzo, recibi diferentes mensajes, tanto del Sr. Wright como de la Srta. Hansen, urgiendo una siguiente reunión. Todos estos llamados los posponia alegando distintos inconvenientes para lograr tiempo de regresar a Nicaragua en forma normal y sin levantar sospechas previas.

Estos últimos desarrollos aqui descritos, ponen en evidencia un claro interes del Gobierno de los Estados Unidos de influir ó de desprestigiar cualquier fallo de la Corte Internacional de Justicia, por medio de la amenaza y el chantaje.

Los pongo en su conocimiento para que el Gobierno de Nicaragua tome las medidas del caso.

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165. THE AGENT OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

11 April 1986.

I refer to the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* in order to forward to the Court a letter sent by the Minister of Foreign Affairs a.i. of Nicaragua in which he describes a very delicate situation.

I take advantage of this note in order to request an interview with the President of the Court for next Monday, April 21.

166. THE REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA

18 April 1986.

I have the honour to transmit to you herewith copies of the following documents, all of which were handed to me today by the Counsellor of the Embassy of Nicaragua:

(1) a letter dated 11 April 1986 addressed to me by the Agent of Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua*;

(2) a letter, likewise dated 11 April 1986, addressed to me by the Acting Minister for Foreign Affairs of Nicaragua and transmitted under cover of the Agent's letter;

(3) a memorandum dated 24 March 1986 of which a copy was enclosed with the letter of the Acting Minister and which was addressed by the Agent to the Minister for Foreign Affairs of Nicaragua.

167. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

21 April 1986.

I have the honour to acknowledge receipt of the following communications, which were handed to me at 12.30 p.m. on Friday 18 April 1986 by the Counsellor of the Embassy of Nicaragua in The Hague:

(1) a letter dated 11 April 1986 which you have addressed to me and which transmits

(2) a letter from the Acting Minister for Foreign Affairs of Nicaragua, likewise dated 11 April 1986 and addressed to me, to which is annexed

(3) a copy of a memorandum dated 24 March 1986 which you addressed to the Minister for Foreign Affairs of Nicaragua.

A copy of each of these documents has been supplied to the other Party in the case concerning *Military and Paramilitary Activities in and against Nicaragua*.

I am further to inform you that, having considered your request, the President of the Court is prepared to receive you at 3.30 p.m. today, Monday 21 April.

168. THE REGISTRAR TO THE MINISTER FOR FOREIGN AFFAIRS OF THE NETHERLANDS

22 April 1986.

With reference to the exchange of letters dated 26 June 1946 between the Government of the Netherlands and the International Court of Justice, constituting an agreement in respect of the privileges, immunities and facilities necessary for the functioning of the Court, I have the honour, with the concurrence of the

President of the Court, to transmit for the consideration of Your Excellency copies of the following communications, all of which were handed to me on Friday 18 April 1986 on behalf of the Agent of Nicaragua before the Court in the pending case concerning *Military and Paramilitary Activities in and against Nicaragua*:

(1) a letter dated 11 April 1986 and addressed to me by the Agent in question;
(2) a letter of the same date, transmitted by the first, and addressed to me by the Minister for Foreign Affairs a.i. of Nicaragua; to this is annexed
(3) a memorandum dated 26 March 1986 and addressed by the Agent to the Minister for Foreign Affairs of Nicaragua.

In transmitting these communications, I venture to draw attention to Article 42 of the Statute of the Court, paragraph 3 of which provides that "The agents, counsel and advocates of parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties", to General Assembly resolution 90 (I) of 11 December 1946, recommending in paragraph 5 (*a*) (i) that such agents, counsel and advocates "should be accorded, during the period of their missions ... the privileges and immunities provided for in Article IV, sections 11, 12 and 13 of the Convention on the privileges and immunities of the United Nations under the conditions of Article IV, Section 15, of that Convention" (*q.v.*) and, more specifically, point V of the General Principles established by the above-mentioned exchange of letters, whereby in particular "the agents, counsel and advocates of the parties" to cases before the Court "shall be accorded such privileges, immunities and facilities for residence and travel as may be required for the independent exercise of their functions".

For your information I should mention that copies of the three documents concerned have been communicated to the United States of America, the other Party in the case, in accordance with the usual practice.

169. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

22 April 1986.

I have the honour to inform Your Excellency that, following your interview of 21 April 1986 with the President of the Court, I transmitted to the Minister for Foreign Affairs of the Netherlands copies of the three communications handed to me on your behalf on 18 April.

The documents in question were sent to the Minister under cover of a letter of today's date, a copy of which I have the honour to enclose.

170. THE REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA

23 April 1986.

With reference to my transmission to you on 18 April 1986 of documents handed to me that day on behalf of the Agent of Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, I have the honour to transmit to you herewith a copy of a letter which I addressed yesterday 22 April to the Minister for Foreign Affairs of the Netherlands together with copies of the same documents.

171. THE LEGAL COUNSEL OF THE UNITED NATIONS TO THE REGISTRAR

(*Facsimile*)

5 May 1986.

This is to inform you that the Permanent Representative of Nicaragua has brought a letter of the acting foreign minister of Nicaragua to Secretary of State Shultz to the attention of the Secretary-General. The letter to the Secretary of State Shultz complains about alleged acts of threat, intimidation and coercion against the Agent of Nicaragua before the Court both on the territory of the United States and by US agents in the Netherlands. The request was to circulate the letter as an official document of the 40th Session of the General Assembly under Agenda Item 21 and of the Security Council. Please find in the attachment the copy of the respective documents.

(*Signed*) Carl-August FLEISCHHAUER.

Letter Dated 30 April 1986 from the Permanent Representative of Nicaragua to the United Nations Addressed to the Secretary-General

I have the honour to transmit to you herewith the text of the communication dated 22 April 1986 addressed to His Excellency Mr. George Shultz, Secretary of State of the United States of America, by His Excellency Victor Hugo Tinoco, Acting Minister for Foreign Affairs of the Republic of Nicaragua.

"His Excellency Mr. George Shultz
Secretary of State of the United States of America

Sir:

I am writing to you with reference to the serious acts of intimidation, coercion, threats and attempted bribery that various officials of the United States Government have sought to commit against Dr. Carlos Argüello, Agent and Counsel of Nicaragua in the proceedings instituted by the Government of Nicaragua against the Government of the United States of America before the International Court of Justice in respect of military and paramilitary activities in and against Nicaragua.

These acts, which involve threats to the family of our Agent, were committed by individuals who identified themselves to Dr. Argüello as FBI agents, during a family visit he made to Miami. Similarly, Dr. Argüello, who also acts as Ambassador of Nicaragua to the Netherlands, was approached in that country, for the same purposes, by officials of the United States Embassy in the Netherlands, specifically by Mr. Lawrence M. Wright and Miss Nikki L. Hansen, First Secretary and Commercial Officer respectively of that diplomatic mission.

The Government of Nicaragua wishes to lodge a strong formal protest against these acts, which are intended to intimidate the persons designated by Nicaragua to handle our case against the United States before the Court, and to influence and discredit the cause of justice, represented in this great world tribunal established by the peoples of the United Nations. These acts show very clearly that the representatives of Nicaragua, counsel and advocates before the International Court of Justice, are being threatened, directly or indirectly, by the United States Government.

The Government of Nicaragua has informed the International Court of Justice of the situation, requesting that all necessary steps be taken to ensure that the agents, counsels and advocates of Nicaragua perform their functions independently in accordance with Article 42, paragraph 3, of the Statute of the Court.

In view of these immoral and illegal acts aimed at altering, by means of threats, blackmail and the offering of bribes, the course of the proceedings instituted by Nicaragua before the Court, the Government of Nicaragua urges the United States Government to cease these acts, which are incompatible with morality, international law and the conduct which States should observe in their relations with each other and in the institutions established by the nations in order to ensure that law and justice prevail, over force, threats and blackmail without interference of any kind. Similarly, the Government of Nicaragua holds the United States Administration responsible for any eventual attacks on the lives or physical and moral integrity of the Agent of Nicaragua and his family.

Accept, Sir, the assurances of my highest consideration.

(*Signed*) Victor Hugo TINOCO,
Acting Minister for Foreign Affairs."

I should be grateful if you would have this letter circulated as an official document of the fortieth session of the General Assembly, under agenda item 21, and of the Security Council.

(*Signed*) Nora ASTORGA,
Ambassador,
Permanent Representative.

Lettre datée du 30 avril 1986, adressée au Secrétaire général par le représentant permanent du Nicaragua auprès de l'Organisation des Nations Unies

J'ai l'honneur de vous transmettre le texte de la communication datée du 22 avril 1986 que M. Victor Hugo Tinoco, vice-ministre des relations extérieures de la République du Nicaragua, a adressée à M. George Shultz, secrétaire d'Etat des Etats-Unis d'Amérique.

« S. Exc. M. George Shultz
Secrétaire d'Etat des Etats-Unis d'Amérique

Monsieur le Secrétaire d'Etat,

J'ai l'honneur de me référer aux graves actes d'intimidation et de coercition, aux menaces et aux tentatives de corruption dont se sont rendus responsables

divers fonctionnaires du Gouvernement des Etats-Unis à l'encontre de M. Carlos Argüello, représentant et conseiller du Nicaragua, en ce qui concerne la plainte déposée par le Gouvernement nicaraguayen contre le Gouvernement des Etats-Unis d'Amérique devant la Cour internationale de Justice au sujet des activités militaires et paramilitaires menées contre le Nicaragua.

Des individus, qui se sont présentés à M. Argüello comme agents du FBI, ont menacé sa famille alors qu'elle se rendait à Miami. De même, M. Argüello, qui remplit aussi les fonctions d'ambassadeur du Nicaragua aux Pays-Bas, a été abordé dans le même but, dans ce pays, par des fonctionnaires de l'ambassade des Etats-Unis aux Pays-Bas; il s'agissait de M. Lawrence M. Wright et de M^lle^ Nikki L. Hansen, respectivement premier secrétaire et attaché commercial de la mission diplomatique américaine.

Le Gouvernement nicaraguayen s'élève formellement et énergiquement contre ces actes destinés à intimider les personnes désignées par le Nicaragua pour suivre la procédure qu'il a engagée contre votre pays devant la Cour, et à influencer et discréditer le cours de la justice, qu'incarne ce haut tribunal universel créé par les peuples des Nations Unies. Ces actes prouvent de toute évidence que les représentants du Nicaragua, ses conseils et ses avocats devant la Cour internationale de Justice sont menacés, directement ou indirectement, par le Gouvernement des Etats-Unis.

Le Gouvernement nicaraguayen a informé la Cour de ces faits, et lui a demandé d'adopter toutes les mesures nécessaires pour garantir l'exercice indépendant des fonctions des agents, conseils et avocats du Nicaragua, conformément au paragraphe 3 de l'article 42 du Statut de la Cour.

Le Gouvernement nicaraguayen, devant ces actes immoraux et illégaux destinés à fausser, par la menace, le chantage et l'offre de pots-de-vin, la procédure qu'il a engagée devant la Cour, lance un appel énergique au Gouvernement des Etats-Unis pour qu'il mette un terme à ces actes contraires à la morale, au droit international et aux règles de conduite que doivent observer les Etats dans leurs relations entre eux et avec les institutions que les nations ont mises en place pour que prévalent, sans ingérence d'aucune sorte, le droit et la justice contre la force, la menace et le chantage. Le Gouvernement nicaraguayen tiendra aussi le Gouvernement des Etats-Unis pour responsable des éventuels attentats contre la vie ou l'intégrité physique et morale dont le représentant du Nicaragua et sa famille pourraient être victimes.

Veuillez agréer, Monsieur le Secrétaire d'Etat, les assurances de ma considération.

(Signé) Victor Hugo TINOCO,
vice-ministre des relations extérieures.»

Je vous serais obligé de bien vouloir faire distribuer le texte de la présente lettre comme document officiel de l'Assemblée générale, au titre du point 21 de l'ordre du jour de sa quarantième session, et du Conseil de sécurité.

L'ambassadrice,
représentante permanente,
(Signé) Nora ASTORGA.

172. THE AMBASSADOR OF THE UNITED STATES OF AMERICA TO THE NETHERLANDS TO THE PRESIDENT

9 May 1986.

I refer to the letter of the Registrar dated April 18, transmitting copies of communications from the Government of Nicaragua alleging that agents or employees of the United States had threatened Ambassador Carlos Argüello Gomez, Nicaragua's Agent before the Court. The United States Government has carefully looked into these allegations.

I have been authorized to state categorically that no agent or employee of the United States Government has in any way threatened Ambassador Argüello or his relatives.

173. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

9 May 1986.

I have the honour to transmit to Your Excellency herewith a copy of a letter of today's date which the Ambassador of the United States of America to the Netherlands has addressed to the President of the Court.

Another copy is being sent to the Minister for Foreign Affairs of the Netherlands.

174. THE MINISTER FOR FOREIGN AFFAIRS OF THE NETHERLANDS TO THE REGISTRAR

4 June 1986.

Complaint by Nicaraguan Agent

I herewith acknowledge receipt of your letter of 22 April 1986, No. 75001, on the subject referred to above. Careful consideration has been given to the issues involved.

On the basis of the documentation transmitted by you and after enquiry, I conclude that no cause exists for further action on the part of the Government of the Netherlands.

(*Signed*) HANS VAN DEN BROEK.

175. THE LEGAL COUNSEL OF THE UNITED NATIONS TO THE REGISTRAR

(*Facsimile*)

10 June 1986.

Please find hereon facsimiled letter dated 5 June 1986 from the United States Mission transmitting a Note from the United States Embassy in Managua addressed to the Ministry of Exterior of the Republic of Nicaragua. The Note is a reply to a letter sent by the Nicaraguan acting minister for foreign affairs to the Secretary of State which was issued as a UN document A/40/1110-S/18044, copies of which were sent to you on 5 May 1986.

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5 June 1986.

Dr. Carl-August Fleischhauer
Under-Secretary-General
The Legal Counsel
The United Nations
United Nations, New York 10017.

Dear Dr. Fleischhauer :

As you will recall, the Permanent Representative of Nicaragua circulated as a United Nations Document a letter sent by the Acting Minister for Foreign Affairs to Secretary of State Shultz (UN doc. A/40/1110, S/18044).

The United States has responded to that letter by a Note from the Embassy of the United States of America in Managua, Nicaragua, addressed to the Ministry of Exterior of the Republic of Nicaragua. A copy of the note is attached for your information.

(*Signed*) Robert ROSENSTOCK,
Adviser, Legal Affairs.

NOTE DATED MAY 15, 1986, FROM THE EMBASSY OF THE UNITED STATES OF AMERICA IN MANAGUA, NICARAGUA, ADDRESSED TO THE MINISTRY OF EXTERIOR OF THE REPUBLIC OF NICARAGUA

The Embassy of the United States of America presents its compliments to the Ministry of Exterior of the Republic of Nicaragua and has the honor to refer to the Ministry's Note No 017 dated April 22, 1986. That Note alleged that the United States had threatened Nicaragua's Ambassador to the Netherlands and agent before the International Court of Justice, Carlos Argüello Gomez.

The Government of the United States considers this allegation a calculated effort to influence improperly the deliberations in which the International Court of Justice is currently engaged. The Embassy states categorically, on behalf of the United States Government, that no agent or employee of the United States Government has in any way threatened Ambassador Argüello or his relatives.

The Embassy is constrained to note that neither the Ministry's note nor the three documents provided by Nicaragua to the International Court of Justice on April 18 provide or assert any evidence supporting the allegation that there had been such a threat. It appears from those documents that the Ministry is basing its allegations solely on an alleged statement by employees of the United States that Ambassador Argüello "did not have to worry about the well-being of his brother or that of his other relatives in the United States".

The Embassy must note that this alleged statement, which the Ministry attempts to characterize as a "threat", pales in comparison with the ominous conclusion to the Ministry's note that "the Government of Nicaragua holds the United States Administration responsible for any eventual attacks on the lives or physical and moral integrity of the Agent of Nicaragua and his family". The Ministry can be assured that no threat to the lives or physical and moral integrity of Ambassador Argüello or his family has been or will at any time be presented by the Government of the United States, its agents or employees.

It is of equal interest that, by the Government of Nicaragua's own account of the documents provided to the Court, the alleged contacts between employees of the United States and Ambassador Argüello were not reported to Managua or, apparently, to any of your country's leaders on their frequent travels to Western Europe, for over seven months after their alleged instigation. Nor, to our knowledge, were any "threats" brought to the attention of the authorities of the Netherlands during that period. It is evident, at a minimum, that Ambassador Argüello did not during that period consider himself to be under any threat either to his life or physical or moral integrity. The Embassy can only speculate as to the motivations which induced him, or the Government of Nicaragua, to publicize these allegations at this time.

The Embassy urges the Ministry to take appropriate steps to provide the same wide distribution to its communications to the International Court of Justice as it has to Note 017, in order that the Nicaraguan public and others to whom that Note has been made available may be fully aware of the inadequate and conclusory nature of the evidence supporting its assertion that the United States has threatened Ambassador Argüello and his family.

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176. THE REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA[1]

12 June 1986.

I have the honour to inform you that the Court will hold a public sitting at the Peace Palace at 9.30 a.m. on Friday 27 June 1986 for the purpose of delivering its Judgment on the Merits in the case concerning *Military and Paramilitary Activities in and against Nicaragua*.

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177. THE REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA

27 June 1986.

I have the honour to transmit to you herewith an official signed copy of the Judgment delivered by the Court today on the merits of the case concerning *Military and Paramilitary Activities in and against Nicaragua*.

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[1] A communication in the same terms was sent to the Agent of the Republic of Nicaragua.

The printed edition of the Judgment, which will be issued as soon as possible, will, in addition to the original texts of the separate and dissenting opinions included in the present official copy, contain a translation of each opinion into French or English as the case may be.

178. THE REGISTRAR TO THE SECRETARY-GENERAL OF THE UNITED NATIONS

27 June 1986.

I have the honour to send you herewith, pursuant to Article 95, paragraph 3, of the Rules of Court, 3 copies of the text produced by offset from typescript, of the Judgment delivered today by the Court in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. A printed copy will be sent to you as soon as available.

179. LE GREFFIER AU MINISTRE DES AFFAIRES ÉTRANGÈRES DE L'AFGHANISTAN[1]

4 juillet 1986.

Le Greffier de la Cour internationale de Justice a l'honneur de transmettre, sous ce pli, un exemplaire de l'arrêt rendu par la Cour le 27 juin 1986[2] en l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*.

Il convient de noter que, pour que l'arrêt soit rapidement disponible, les opinions des juges jointes à celui-ci n'ont été reproduites que dans la langue originale (anglais ou français).

D'autres exemplaires imprimés où figurera la traduction des opinions seront expédiés par la voie ordinaire dès leur sortie de presse.

180. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA[3]

13 July 1986.

I have the honour to transmit to Your Excellency herewith a formal memorandum under the seal of the Court, correcting a clerical error in the French text of the Judgment delivered on 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. This memorandum should be attached to or kept with the sealed copy of that Judgment transmitted to the Government of Nicaragua.

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[1] Une communication analogue a été adressée aux autres Etats admis à ester devant la Cour.

[2] *C.I.J. Recueil 1986*, p. 14.

[3] A communication in the same terms was sent to the Agent of the United States of America.

16 juillet 1986.

MÉMORANDUM

La correction ci-après d'une erreur matérielle dans le texte français de l'arrêt du 27 juin 1986, en l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci*, est autorisée :

Première page, troisième alinéa du sommaire, et page 15, lignes 7 et 20 du paragraphe 33, lire "différend d'ordre juridique" au lieu de "différend juridique" ; page 15, lignes 3 et 5 du paragraphe 33, et page 16, ligne 15 de cette page, lire "différends d'ordre juridique" au lieu de "différends juridiques".

181. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

7 May 1987.

I have the honour to transmit to you herewith a formal memorandum under the seal of the Court, correcting certain clerical errors in the official text of the Judgment delivered on 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua*. This memorandum should be attached to or kept with the sealed copy of that Judgment transmitted to your Government.

I also enclose an erratum slip relating to the printed version of the Judgment. This, you will observe, notes also a correction to the French translation of a dissenting opinion.

(*Signed*) Eduardo VALENCIA-OSPINA.

182. THE REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA[1]

7 May 1987.

I have the honour to transmit to you herewith a formal memorandum under the seal of the Court, correcting certain clerical errors in the official text of the Judgment delivered on 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua*. This memorandum should be attached to or kept with the sealed copy of that Judgment transmitted to your Government.

I also enclose an erratum slip relating to the printed version of the Judgment. This, you will observe, notes also a correction to the French translation of a dissenting opinion.

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[1] A communication in the same terms was sent to the Agent of the Republic of Nicaragua.

183. THE AGENT OF THE REPUBLIC OF NICARAGUA TO THE DEPUTY-REGISTRAR

7 September 1987.

I have the honor to refer to the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.

In the judgment of June 27, 1986, on the merits of this case, the Court decided that the United States is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua both by the breaches of obligations under customary international law enumerated in the judgment, as by the breaches of the Treaty of Friendship, Commerce and Navigation between the parties signed at Managua on 21 January 1956.

In the operative provisions of the judgment, the Court:

> "(15) by fourteen votes to one,
>
> *Decides* that the form and amount of such reparation, failing agreement between the Parties, will be settled by the Court, and reserves for this purpose the subsequent procedure in the case."

Prior to the Court's decision, the United States had communicated to the Court by a letter dated 18 January 1985, that: "... the United States intends not to participate (*sic*) in any further proceedings in connection with this case ..."

This clear statement of position by the United States to the Court leaves no room for doubt that the decision of that Government did not refer to the procedures then in course, but to "any further proceedings".

Nicaragua is not aware of the Court having received any further communication from the United States that could indicate any change of its decision on this case.

Nonetheless, in accordance with the decision of the Court, Nicaragua sent a communication to the United States on July 1986 expressing its willingness to discuss the matter of reparation.

The reply of the United States was negative.

Nicaragua sent a second communication on May 12, 1987, to the United States reiterating its willingness to meet in order to try to reach an agreement on the amount of reparation it was owed.

The reply of the United States leaves no room for doubt that the United States is not willing to reach an agreement with Nicaragua[1].

This situation further evinces that the United States has not changed the decision communicated to the Court in the letter cited above.

For purposes of procedure, Nicaragua would recall that in the final submissions it made in the merits phase of this case, it pleaded:

> "Third: ... the Court is requested further to receive evidence and to determine, in a subsequent phase of the present proceedings, the quantum of damages to be assessed as the compensation due to the Republic of Nicaragua."

The Court accepted the request of Nicaragua, and very clearly stated in paragraph 284 of the judgment:

> "The Court considers appropriate the request of Nicaragua for the nature

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[1] A copy of the letter of May 12, 1987, as modified by note of June 20, 1987, is included with an English translation. The reply of the United States of August 1, 1987, is also included.

> and amount of the reparation due to it to be determined in a subsequent phase of the proceedings. While a certain amount of evidence has been provided, for example, in the testimony of the Nicaraguan Minister of Finance, of pecuniary loss sustained, this was based upon contentions as to the responsibility of the United States which were more far reaching than the conclusions at which the Court has been able to arrive. The opportunity should be afforded Nicaragua to demonstrate and prove exactly what injury was suffered as a result of each action of the United States which the Court has found contrary to international law. Nor should it be overlooked that, while the United States has chosen not to appear or participate in the present phase of the proceedings, Article 53 of the Statute does not debar it from appearing to present its arguments on the question of reparation if it so wishes. On the contrary, the principle of the equality of the parties requires that it be given that opportunity."

Nicaragua considers that this case still remains squarely within Article 53 of the Statute as invoked by Nicaragua in the merits phase of these proceedings and that, therefore, this Article is still in operation.

At the same time, Nicaragua wishes to take the opportunity afforded by the Court, in the paragraph cited, in order to satisfy the Court that the nature and amount of the reparation it claims is well founded in fact and law.

For this reason, Nicaragua wishes to initiate the next phase of the proceedings and, therefore, requests that the Court or the President if the Court is not sitting, to make the necessary orders for the conduction of the case and in particular the time-limit within which Nicaragua should file its pleading.

As to the non-appearing party, the position of Nicaragua is that if the United States does not communicate that it has changed its intention "not to participate in any further proceedings in connection with this case", it should be accorded the same treatment as in the previous phase on the merits. That is, the United States should be given a short time-period in which to file a counter-memorial with the proviso that it could be extended if it so requested.

This position of Nicaragua does not pretend to debar the United States from appearing, in accordance with the Statute and Rules of Court, to present its arguments on the question of reparation if it so wishes. Quite the contrary, Nicaragua would welcome the appearance of the United States Government as an indication of its decision to comply with its international commitments.

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184. THE DEPUTY-REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA

16 September 1987

I have the honour to transmit to you herewith a copy of a letter dated 7 September 1987 which I have today received from the Agent of Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.

In view of the fact that in this letter the Applicant invokes the Court's Judgment of 27 June 1986 for the purpose of initiating a further phase in the above case, and having regard to Article 48 of the Statute and Articles 31, 40 and 44 of the Rules of Court, I am to advise you that the Agents of the Parties are expected to hold themselves in readiness for a meeting with the President of the Court at which each will have the opportunity to state the views of his Government. You will be informed in due course of the date of this meeting.

Meanwhile, it would be appreciated if, without prejudice to any views that may be expressed on behalf of your Government at such meeting, you would be so good as to provide me with an early acknowledgment of this communication.

(Signed) Bernard NOBLE.

185. THE DEPUTY-REGISTRAR TO THE SECRETARY OF STATE OF THE UNITED STATES OF AMERICA

16 September 1987.

I have the honour to draw to the attention of Your Excellency a letter which I have today addressed to the Deputy-Agent of the United States of America in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Mr Patrick M. Norton.

A copy of that communication is enclosed, together with a copy of the letter from the Agent of Nicaragua transmitted therewith.

Though the withdrawal of the Hon. Davis R. Robinson as Agent in these proceedings has never formed the subject of any notification, the Registry has for practical reasons addressed all case documents to Mr. Norton since Mr. Robinson ceased, on 1 May 1985, to be the Legal Adviser to the Department of State. Having regard to Article 40 of the Rules of Court and bearing in mind the future communications to be made, I would be most grateful if at this juncture you could inform me of your views on the subject.

186. THE DEPUTY-REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

16 September 1987.

I have the honour to acknowledge receipt of a letter dated 7 September 1987, and delivered in the Registry today, in which Your Excellency invokes the Court's Judgment of 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* for the purpose of initiating further proceedings in regard to your Government's claim to reparation.

Copies of your communication were sent without delay to the Government of the United States, which has been advised that it will be informed in due course of the date fixed for the meeting to be held in accordance with Article 31 of the Rules of Court. The Registry will of course not fail to notify you likewise.

I beg further to take this opportunity of seeking clarification of a few details in regard to your enclosures. The first enclosure is described in your footnote as "the letter of May 12, 1987, as modified by note of June 20, 1987", whereas the United States Embassy, in the second enclosure, refers to two "notes" of these dates and the first enclosure itself appears to be a photocopy of a self-contained and unrevised letter bearing the sole date of 12 May 1987. Secondly, it is not evident whether the second enclosure is a photocopy of an original or of a transcription, and a blemish has obscured a few words in the third paragraph.

In view of the interest of these documents at the threshold of the further proceedings, I venture to suggest that it is particularly important that these questions be elucidated.

A copy of this letter will be communicated to the Government of the United States.

187. THE REGISTRAR TO THE SECRETARY OF STATE OF THE UNITED STATES OF AMERICA

26 October 1987.

I have the honour to refer to the letter which the Deputy-Registrar addressed to Your Excellency on 16 September 1987, with which was forwarded to you a copy of a letter dated 7 September 1987 received from the Agent of Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, and a copy of a letter sent by the Deputy-Registrar to Mr. Patrick M. Norton, Deputy-Agent of the United States of America in that case. I now have the honour to inform Your Excellency that the President of the Court requests the Agents of the Parties to meet him on Tuesday 17 November 1987 at 10 a.m. at the Peace Palace in order that he may ascertain the views of the Parties on questions of procedure, in accordance with Article 31 of the Rules of Court. Without prejudice to the provisions of the Statute and Rules regarding the appointment of an Agent, I am instructed to inform you that should the Government of the United States of America wish to be otherwise represented at that meeting, the person designated will be welcome to attend.

188. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA[1]

26 October 1987.

I have the honour to refer to the letter which the Deputy-Registrar addressed to Your Excellency on 16 September 1987, acknowledging receipt of your letter of 7 September 1987 concerning the Judgment of 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, in which the Deputy-Registrar referred to a meeting to be held under Article 31 of the Rules of Court. I now have the honour to inform Your Excellency that the President of the Court requests the Agents of the Parties to meet him on Tuesday 17 November 1987 at 10 a.m. at the Peace Palace in order that he may ascertain the views of the Parties on questions of procedure, in accordance with that Article.

I enclose for your information a copy of a letter which I have today addressed to the United States Secretary of State in this connection.

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[1] A communication in the same terms was sent to the Deputy-Agent of the United States of America.

189. THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

13 November 1987.

I have the honor to refer to your letter of 26 October 1987 concerning the scheduling of further pleadings in the case of *Nicaragua v. United States of America*.

The United States remains of the view, for the reasons given in its written and oral pleadings at the jurisdictional phase of the aforementioned case and as set forth in our letter to the Court of 18 January 1985, that the Court is without jurisdiction to entertain the dispute, and that the Nicaraguan Application of 9 April 1984 is inadmissible. Accordingly, I wish to inform you that the United States Government will not be represented at the meeting scheduled for 17 November 1987.

190. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

17 November 1987.

I have the honour to transmit to Your Excellency herewith a copy of a letter from the Deputy-Agent of the United States of America, dated 13 November 1987 and received in the Registry yesterday.

191. THE REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA[1]

18 November 1987.

Further to my letter of yesterday's date, I have the honour to inform you that by an Order adopted today, the sealed copy of which is enclosed, the Court decided to fix the following time-limits for pleadings on the question of the form and amount of reparation to be made in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*:

for the Memorial of Nicaragua: 29 March 1988

for the Counter-Memorial of the United States: 29 July 1988.

192. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA[2]

21 December 1987.

I have the honour to send you herewith printed copies of the Order[3] made by the Court on 18 November 1987 fixing time-limits for pleadings on the question of the form and amount of reparation to be made in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*).

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[1] A communication in the same terms was sent to the Agent of the Republic of Nicaragua.

[2] A communication in the same terms was sent to the Agent of the United States of America.

[3] See *I.C.J. Reports 1987*, p. 188.

193. THE REGISTRAR TO THE SECRETARY-GENERAL OF THE UNITED NATIONS

21 December 1987.

I have the honour to send you herewith printed copies of the Order made by the Court on 18 November 1987 fixing time-limits for pleadings on the question of the form and amount of reparation to be made in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*).

194. LE GREFFIER AU MINISTRE DES AFFAIRES ÉTRANGÈRES D'AFGHANISTAN[1]

21 décembre 1987.

Le Greffier de la Cour internationale de Justice a l'honneur de transmettre, sous ce pli, un exemplaire du texte imprimé de l'ordonnance du 18 novembre 1987[2] par laquelle la Cour a fixé des délais pour la procédure écrite sur la question des formes et du montant de la réparation due en l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci* (*Nicaragua* c. *Etats-Unis d'Amérique*).

195. THE AGENT OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

29 March 1988.

I have the honour to certify, pursuant to Articles 50, paragraph 1, and 51, paragraph 2, of the Rules of Court, that the documents reproduced as annexes to the Memorial on Compensation filed today by the Republic of Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*) are true copies of the original documents, and that the translations of Spanish original texts included among those annexes are accurate.

196. THE REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA

29 March 1988.

I have the honour to refer to the Order made by the Court on 18 November

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[1] Une communication analogue a été adressée aux autres Etats admis à ester devant la Cour.

[2] *C.I.J. Recueil 1987*, p. 188.

1987 in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, and to inform you that the Memorial of Nicaragua, on the question of the form and amount of reparation to be made in the case, contemplated by that Order was filed in the Registry today, within the time-limit fixed by the Order. I have the honour further to transmit to you herewith a copy of the Memorial signed by the Agent of Nicaragua, constituting the certified copy required by Article 52, paragraph 1, of the Rules of Court, and a copy of a certificate supplied by the Agent to comply with Articles 50, paragraph 1, and 51, paragraph 2, of the Rules of Court.

197. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

30 March 1988.

I have the honour to acknowledge receipt of the Memorial on Compensation in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, filed by the Government of Nicaragua yesterday, within the time-limit fixed by the Court's Order of 18 November 1987, together with a further signed copy for transmission to the other Party and 125 plain copies.

I have the honour further to acknowledge receipt of the documents described on the list enclosed, which I understand have been deposited by the Government of Nicaragua in the Registry pursuant to Article 50, paragraph 2, of the Rules of Court.

LIST OF MATERIALS DEPOSITED WITH THE COURT

1. United Nations Economic Commission for Latin America and the Caribbean (ECLAC), Annual Reports on Nicaragua.

1.1	1987
1.2	1986
1.3	1985
1.4	1984
1.5	1983
1.6	1982
1.7	1981
1.8	1980

2. Interamerican Development Bank (IDB), *Informe Economico Nicaragua* (1983).

3. U.S. Congress, Report of the Congressional Committee on, *The Iran-Contra Affair* (November 1987).

4. U.S. Presidency, Report of the President's Special Review Board, *"Tower Commission Report"* (February 26, 1987).

5. Dossier, *Pratique du Conseil de sécurité des Nations Unies en matière d'évaluation de dommages.*

198. THE DEPUTY-REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

1 August 1988.

I have the honour to inform Your Excellency that the time-limit of 29 July 1988 fixed by the Court's Order of 18 November 1987 for the filing by the United States of America of a Counter-Memorial on the question of the form and amount of reparation to be made in the case concerning *Military and Paramilitary Activities in and against Nicaragua* has elapsed without the receipt of such pleading in the Registry.

199. THE DEPUTY-REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA

1 August 1988.

I have the honour to enclose a copy of a letter which I have today addressed to the Agent of Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua*.

200. THE REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA[1]

14 June 1989.

I have the honour to inform you that, pursuant to Article 31 of the Rules of Court, the President of the Court will hold a meeting with the Agents of the Parties in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* on Thursday 13 July 1989 at 11.00 a.m., to discuss the further procedure in the case.

201. THE AMBASSADOR OF THE UNITED STATES OF AMERICA IN THE HAGUE TO THE REGISTRAR

11 July 1989.

I have the honor to transmit the enclosed letter in response to your letter of 14 June 1989 concerning further procedure in the case Nicaragua brought against the U.S. in 1984.

(*Signed*) C. Howard WILKINS.

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[1] A communication in the same terms was sent to the Agent of the Republic of Nicaragua.

I have the honor to refer to your letter of 14 June 1989 concerning further procedure in the case Nicaragua brought against the United States of America in 1984.

The United States remains of the view, for the reasons given in its written and oral pleadings at the jurisdictional phase of the aforementioned case and as set forth in its letter to the Court of 18 January 1985, that the Court is without jurisdiction to entertain the dispute, and that the Nicaraguan Application of 9 April 1984 is inadmissible.

Furthermore, the United States notes that the Government of Nicaragua had recourse to the procedure set out in Article 94 (2) of the United Nations Charter on two occasions in connection with this case on July 31, 1986, and on October 28, 1986. The Security Council declined to give effect to Nicaragua's requests.

In recent months considerable progress has been made to bring the crisis in Central America to a peaceful conclusion in accordance with the Esquipulas II Accords. Further proceedings in the subject case will continue to complicate those ongoing efforts and will tend to interfere with the acceptance of constructive, practical steps by the parties.

Accordingly, I must inform you that the United States Government will not be represented at the meeting scheduled for 13 July 1989.

(*Signed*) Abraham D. SOFAER.

202. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

1 February 1990.

I have the honour to refer to the Memorial on Compensation filed by the Government of Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, and to invite Your Excellency's attention to the following queries.

In paragraph 99 of the Memorial there appears to be an arithmetical error. The claimed total "Physical Damages to Capital" in the table on page 9 of Annex I.2b is US$195.8 million; deducting the US$4.5 million for 1980-81 leaves US$191.3 million. If the figure in the same table for "Damage to Goods" (1982-1987) of US$25.8 million is added to this, the total is US$217.1 million. Deduction of the US$6.6 million for the "Specific attacks" leaves US$210.5 million; but the net figure in paragraph 99 for "Physical Damages" is given as US$210.4 million. Is this an error, or is there another explanation?

On pages 111-112 [1], paragraph 287, reference is made to a World Bank publication entitled "Nicaragua — The Challenge of Reconstruction", stated to have been deposited with the Court. I am however unable to trace that this publication was so deposited, and should be grateful if you could make a copy available. It might also be useful if at the same time you would supply a copy of the publication mentioned on page 112 [2] (para. 289) of the Memorial, entitled "Economic Policy Guidelines 1983-1988".

In line 3 of paragraph 344 of the Memorial, should the reference to Annex I.2 be to Annex IV/2 [2]?

Annex IV/4 to the Memorial appears to be incomplete (both in Spanish and in English). It announces the inclusion of "alternative scenarios for the period

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[1] P. 304, *supra*.
[2] *Ibid.*

1988-1990", but only gives the first of these; and it refers to "Tables 1 to 11 of the Appendix I", which are not included. Can a complete copy of the document be supplied, please?

In Annex III.8, page 8, calculations of losses on meat exports are stated to be based on 57 per cent of the total value of exported meat, but the notes to table No. 5 on the following page refer to 47 per cent of total sales. Is this an error, and if so which is the correct figure?

There are some arithmetical discrepancies between the totals given in Annex VI.1, table 1, and the figures given for the same items in the first part of table 2 in Annex VI.2; and the "Net Present Value" of "Total Loss of Economic Development Potential" in that table appears to sum to 4,102.40 horizontally and 4,102.50 vertically. This is probably the effect of rounding off the calculations to the nearest 0.1 million, but the figures should perhaps be verified.

May I also remind Your Excellency of the points brought to your attention by my letter of 28 June 1989?

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203. THE REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA

5 March 1990.

I have the honour to inform you that on 2 March 1990 the President of the Court received the Agent of Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, and made the following statement to him:

> "The Court has taken note of the question raised in the Memorial of Nicaragua on Compensation in this case, paragraph 459, whether Nicaragua could be given some indications by the Court 'as to the particular issues of law on which the deliberations of the Court were likely to focus or issues of fact which the Court wishes to explore or to explore further'. In this connection, Nicaragua has drawn attention to the provisions of Articles 61 and 62 of the Rules of Court. Nicaragua went on in its Memorial to observe that 'an indication sufficiently in advance of the opening of the oral hearings would be of particular assistance' to it.
>
> The Court has given careful consideration to this question, and has come to the conclusion that at the present stage of the proceedings it would not be appropriate for it to exercise such powers as the Rules confer upon it in this respect. At the hearings, it is to be expected that either the Court or individual Members of it will make full use of the power to put questions to the Agents, counsel and advocates of Nicaragua."

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204. LE SECRÉTAIRE DE L'ASSEMBLÉE NATIONALE DE LA RÉPUBLIQUE DU NICARAGUA AU GREFFIER

Managua, 10 de abril de 1990.

Tengo el honor de dirigirme a Usted para remitirle "ley de protección de los derechos de Nicaragua en el marco de la corte internacional de justicia"[1].

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[1] Spanish text not reproduced.

aprobada por la Asamblea Nacional de la República de Nicaragua, en Sesión Plenaria el cinco de abril del corriente año.

Consideramos que es de gran importancia esta ley para el pueblo nicaragüense, en los actuales momentos en que está pendiente la ejecución de la sentencia de la Corte Internacional de Justicia de la Haya, para asegurar su cumplimiento a cabalidad.

Por este medio, le solicitamos su amable gestión para que el órgano parlamentario que Usted tan dignamente preside, conozca y apoye esta ley trascendental aprobada por nuestra Asamblea Nacional.

(*Signed*) Rafael SOLIS CERDA.

(Translation)

ACT No. 92

THE PRESIDENT OF THE REPUBLIC OF NICARAGUA

Makes it known to the people of Nicaragua that:

THE NATIONAL ASSEMBLY OF THE REPUBLIC OF NICARAGUA

WHEREAS

I

The Republic of Nicaragua has been the target of military and paramilitary activities encouraged, financed, organized, directed and executed by the United States of America.

II

In order to defend itself against those unlawful activities, Nicaragua referred the matter to the International Court of Justice in its capacity of the highest judicial organ at international level, which, in its historic Judgment of 27 June 1986, found in favour of Nicaragua's arguments and decided that the United States of America was under an obligation to make reparation to it for all injury caused by the military and paramilitary activities condemned by that illustrious judicial body.

III

The Government of the Republic is fundamentally obligated to defend the rights of Nicaragua, particularly in relation to the obtaining of whatever sufficient reparation the International Court of Justice may define — a reparation which constitutes an inalienable heritage of all Nicaraguans who have been, in one way or another, the victims of the unlawful policies condemned by the International Court of Justice.

IV

That reparation should be used for the reconstruction of Nicaragua and to give to war victims such assistance as will enable them to live with dignity, to solve the problems arising from the injury they have sustained and to guarantee a future to their children and to other family members.

V

Since that reparation is the national heritage of Nicaragua, it may not be the subject of any alienation or secret negotiation, nor may it be of an amount lower than that claimed by Nicaragua or that which may be determined by the International Court of Justice in due course;

And as the International Court of Justice, the principal judicial organ of the United Nations, plays a very important part in the efforts made to establish peace and international security, and provides an essential means of attaining the peaceful settlement of disputes between States.

The assembly has, in the exercise of its powers,

PASSED

The

ACT PROTECTING THE RIGHTS OF NICARAGUA WITHIN THE FRAMEWORK OF THE INTERNATIONAL COURT OF JUSTICE

of which the tenor is as follows:

Art. 1: The Government of Nicaragua, relying upon Articles 1, 3, 4 and 92 of the Constitution of the Republic of Nicaragua, shall continue the proceedings brought against the United States of America before the International Court of Justice, until the delivery of the definitive judgment which that illustrious judicial body is to give in respect of the form and amount of reparation to be made by the United States to Nicaragua in accordance with the Judgment of 27 June 1986, including the execution of that Judgment before the competent tribunals.

Art. 2: The Government shall be able to desist from that action if the United States agrees to make voluntary reparation to Nicaragua, to an extent which shall not in any event be less than the sum claimed by Nicaragua in its Memorial of 29 March 1988, expressed in terms of the equivalent in value on the date of effective payment. The decision to desist should, in any event, be implemented through the medium of a treaty to be approved by the National Assembly.

Art. 3: The reparation payable by the United States to Nicaragua is the inalienable heritage of all Nicaraguans and shall be used to compensate injuries occasioned by the war, to compensate victims and m[illegible] their families; to bring about the material developme[illegible]; to promote the struggle against an inherited situat[illegible]ardness and subordination; to improve the living conditio[illegible] people; and to bring about an increasingly fairer distribution of wealth, in accordance with the provisions of Articles 56, 62, 63, 64 and 98 of the Political Constitution of the Nation.

Art. 4: The rights to which Nicaragua has laid claim before the International

Court of Justice together constitute the inalienable heritage of all Nicaraguans, so that any acts effected and agreements entered into by officials of the Government, which may have the effect of reducing the amount of reparation or which may, by any means, lead to an abandonment of the claim to that reparation or to its non-payment, shall be considered to be prejudicial to Nicaragua's right to economic and social development and, for that reason, to be automatically null and void.

Art. 5: With a view to ensuring an optimal defence of Nicaragua's interests, and the continuation of the judicial proceedings until such time as they are officially terminated, the President of the Republic shall appoint our country's Agent and Co-Agent to the International Court of Justice; they must be qualified persons with a perfect knowledge of the Court's case-law and experienced in dealing with it.

Art. 6: Special funds shall be assigned to the pursuit of those proceedings.

The Executive Power, through the intermediary of the Finance Ministry, shall make an allocation to the corresponding Chapter of the General Budget of the Republic for 1990 and to future budgets, by means of provisions in the Finance Act for each year.

The Foreign Affairs Commission of the National Assembly is, in accordance with the General Statute and Rules of Procedure of that Assembly, authorized to monitor the proceedings in the case and, in co-ordination with the Executive Power, to keep the General Assembly informed of developments.

Art. 7: The present Act is mandatory; it shall enter into force on the date of its publication in any organ of social communication, without prejudice to its subsequent publication in the official journal, *La Gazeta*.

Done in the Assembly Hall of the National Assembly, on 5 May in the year 1990, "*YEAR OF PEACE AND RECONSTRUCTION*."

Carlos NUÑEZ TELLEZ,

President of the National Assembly.

Rafael SOLIS CERDA,

Secretary of the National Assembly.

We accordingly give this Act the status of the law of the land, and order its publication and implementation. Managua, 6 April in the year 1990, "*YEAR OF PEACE AND RECONSTRUCTION*."

Daniel ORTEGA SAAVEDRA,

President of the Republic.

205. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA[1]

15 June 1990.

I have the honour to inform Your Excellency that the President of the Court wishes to ascertain, pursuant to Article 31 of the Rules of Court, the views of the Parties to the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* on the date to be fixed for the opening of the oral proceedings on the question of reparation. The case has been ready for hearing, in accordance with Article 54, paragraph 1, of the Rules of Court, since the expiration of the time-limit fixed for the United States Counter-Memorial on that question; and the outstanding question, raised by Nicaragua, of possible action under Articles 61 and 62 of the Rules of Court was dealt with by the Court's decision communicated to you on 2 March 1990.

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[1] Spanish text not reproduced.

There being no longer any special circumstances related to other cases, as contemplated by Article 54, paragraph 2, of the Rules of Court, which would have to be taken into account, the President considers that oral proceedings should open in October of the current year; he wishes however to hear any observations that the Parties may wish to offer before fixing a date.

The President will therefore hold a meeting with the Agents or other representatives of the Parties at 10.30 a.m. on Friday 22 June 1990.

206. THE AGENT OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

20 June 1990.

I have the honour to refer to your letter of 15 June 1990 in which you inform me that the President of the Court wishes to ascertain the views of the Parties on the date to be fixed for the opening of the oral proceedings on the question of reparation in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.

Your letter further informs us that the President considers that oral proceedings should open in October of the current year, but that the President wishes to hear any observations of the Parties before fixing a date.

In relation to this matter, it might be useful to refer to our last meeting of 14 June 1990 in which we had occasion to discuss several different issues Nicaragua has before the Court.

On that occasion, I indicated that the new Government of Nicaragua is carefully studying the different matters it has pending before the Court. That the instant case is very complex and that this, added to the many difficult tasks facing the Government, are special circumstances that would make it extremely inconvenient for it to take a decision on what procedure to follow in this case during the coming months. I further indicated that I would send a letter confirming Nicaragua's position on this matter.

I hasten to fulfill this last before the meeting of 22 June 1990 in the hope that it will be useful to the President on that occasion.

207. THE REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA

21 June 1990.

I have the honour to transmit herewith copy of a letter dated 20 June 1990 received today in the Registry from the Agent of Nicaragua in the case concerning

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America).

208. THE AMBASSADOR OF NICARAGUA TO THE NETHERLANDS TO THE REGISTRAR

24 July 1990.

I have the honour to inform the Court that my accreditation as Ambassador of the Republic of Nicaragua to the Kingdom of the Netherlands — which dates back to February 1984 — will come to an end as of 15 August 1990.

Nonetheless, I will continue to act as Agent of the Republic of Nicaragua in the three cases presently pending before the Court; that is, the cases concerning

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America);

Border and Transborder Armed Actions (Nicaragua v. Honduras);

Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene.

The Mission of the Republic of Nicaragua before the Court will continue to have its office in Zoutmanstraat 53 E, Den Haag. For the purposes of Article 40 (1) of the Rules of Court this should continue to be the address to which all communications relating to the above cases should be sent.

In the exercise of my duties as Agent in the cases mentioned, I will continue to reside with my family and service staff for an indefinite period in The Hague in my present address: Zijdelaan 25, Den Haag. For this reason, I request that notice be taken of this fact in granting me the privileges and immunities necessary to the independent exercise of my duties.

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209. THE REGISTRAR TO THE MINISTER FOR FOREIGN AFFAIRS OF THE NETHERLANDS

31 July 1990.

I have the honour to transmit to Your Excellency herewith a copy of a letter dated 24 July 1990 from His Excellency Mr. Carlos Argüello Gómez, Ambassador of Nicaragua to the Netherlands, and Agent of his Government before the Court in the cases concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Border and Transborder Armed Actions (Nicaragua v. Honduras)* and *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) (Application for Permission to Intervene)*.

Pursuant to paragraph V of the General Principles agreed by exchange of letters on 26 June 1946 between the President of the Court and the Minister for Foreign Affairs of the Netherlands, concerning the privileges, immunities and facilities necessary for the exercise by the Court of its functions, may I draw Your Excellency's attention in particular to the last paragraph of Mr. Argüello's letter. Bearing in mind the excellent relations that have always existed between the Court and the Government of the Netherlands, I am confident that there will be no difficulty in continuing to extend to the Agent of Nicaragua the privileges, immunities and facilities appropriate to his position and functions.

210. THE AGENT OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

13 September 1990.

I have the honour to refer to the letter of 24 July 1990 in which I informed the Court that my accreditation as Ambassador of the Republic of Nicaragua to the Kingdom of the Netherlands was shortly coming to an end, but that I would continue to act as Agent of the Republic of Nicaragua in the three cases presently pending; that is, the cases concerning

— *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*)
— *Border and Transborder Armed Actions* (*Nicaragua* v. *Honduras*)
— *Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras*), Application to Intervene.

The letter explained that, as Agent, I would continue to reside and have an address for communications at the seat of the Court. This arrangement avoids what the Permanent Court of International Justice has already seen as a difficulty of a practical order that would result in having Agents residing very far from The Hague. (*P.C.I.J., Series E, No. 3*, pp. 205-206.)

The fact of residing in The Hague during the period of my Mission — without in the future enjoying the privileges and immunities proper to an Ambassador accredited to the Kingdom of the Netherlands — makes it imperative that I have a clear understanding of the precise extent of the privileges and immunities to be extended to me by the Netherlands Government pursuant to Article 42 of the Statute of the Court and the 1946 Exchange of Letters between the Government of the Netherlands and the Court.

Since I will be going to Nicaragua for consultations in relation to my duties as Agent within the next 2 or 3 weeks, it is a matter of very practical and urgent need for my Government to know what these privileges and immunities (and facilities) signify *in concreto*.

May I therefore request you, inasmuch as it is the Court which is party to the 1946 Exchange of Letters, to be so good as to approach the Netherlands Ministry of Foreign Affairs to ask them to state the nature and extent of the privileges and immunities they propose to extend to me as Agent of my Government before the Court.

The urgency of knowing precisely the status accorded to the Agent and to the Mission of Nicaragua before the Court in the host country, has prompted me to anticipate some indications of the understanding we have gathered from the documents regulating this matter.

Article 42 (3) of the Statute is clear in indicating that Agents are (1) representatives of States and, (2) that they enjoy privileges and immunities, in all cases *ex officio*, without the need of recourse to the umbrella of the diplomatic accreditation to the Netherlands.

Nonetheless, the extent of the privileges is not entirely apparent. If we compare the wording of Article 42 (3) of the Statute with the kindred disposition of Article 105 (2) of the Charter, we could conclude that the extent of the privileges and immunities of an Agent are more comprehensive than those of the other Representatives of the Members of the United Nations: Article 42 (3) of the Statute does not contain the explicit wording of Article 105 (2) of the Charter limiting the enjoyment of privileges and immunities to those necessary for the exercise of their functions in connection with the Organization.

The letter from the President of the Court to the Minister for Foreign Affairs of the Netherlands of 26 June 1946 contains the General Principles that would govern the subject under discussion. With relation to the status of Agents, the governing principle is that they "shall be accorded such privileges, immunities and facilities for residence and travel as may be required for the independent exercise of their functions". This principle clarifies that the privileges, immunities (and facilities) are applicable to the residence and travel requirements as well as to the exercise of the functions of an Agent.

Finally, General Assembly resolution 90 (I) of 11 December 1946 recommends that the privileges and immunities of Agents be the same as those enjoyed by other Representatives of Members of the United Nations based on Article 105 (2) of the Charter and the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 which regulates the matter. Ambassador Rosenne — in the 2nd edition of his *The Law and Practice of the International Court*, page 219 — found "of interest to note that the Rapporteur of Sub-committee 2 of the Sixth Committee which dealt with this question" and that crystallized into Resolution 90 (I) of 11 December 1946 was precisely the representative of the Government host of the Court.

The Netherlands deposited its instrument of accession to the Convention on the Privileges and Immunities of the United Nations on 19 April 1948, that is, more than a year *after* the date of Resolution 90 (I) of 11 December 1946 which had recommended that Agents be accorded the same privileges and immunities as other representatives of Member States are accorded in the Convention in reference. Therefore, it would also be of interest to note whether on occasion of the deposit of the accession — or in any moment prior to this deposit — the Netherlands made any reference to this Recommendation of the General Assembly which, in the words of Ambassador Rosenne, "partake of the nature of 'understandings' as to the purport of the agreement" reached between the President of the Court and the Minister of Foreign Affairs of the Netherlands.

211. THE REGISTRAR TO THE MINISTER FOR FOREIGN AFFAIRS OF THE NETHERLANDS

17 September 1990.

I have the honour to refer to my letter of 31 July 1990, with which I transmitted to Your Excellency a copy of a letter dated 24 July 1990 from His Excellency Mr. Carlos Arguello Gomez, Agent of the Republic of Nicaragua in three cases before the Court. I have now received a further letter from Mr. Argüello on the subject of the privileges and immunities to be enjoyed by him in the Netherlands by reason of his status as Agent, and in that letter he requests me to approach the Netherlands Ministry of Foreign Affairs on the matter.

I therefore have the honour to transmit to you a copy of Mr. Argüello's letter, and to express the hope that you will be able to assist in this matter by stating, in accordance with his request, the nature and extent of the privileges and immunities which the Government of the Netherlands proposes to extend to him as Agent of the Republic of Nicaragua before the Court.

212. THE MINISTRY OF FOREIGN AFFAIRS OF THE NETHERLANDS TO THE REGISTRAR

19 October 1990.

The Ministry of Foreign Affairs presents its compliments to the Registrar of the International Court of Justice and with reference to the latter's letter of

17 September 1990 and the attached letter of Mr. C. Argüello Gomez, Agent of the Republic of Nicaragua to the Court, has the honour to inform the Registrar as follows.

On the basis of the exchange of Notes between the President of the International Court of Justice and the Minister for Foreign Affairs of the Kingdom of the Netherlands of 26 June 1946, concerning the Privileges and Immunities of the International Court of Justice, of the UN General Assembly Resolution 90 (I) of 11 December 1946 and of the UN Convention on the privileges and immunities of the United Nations of 13 February 1946, an Agent of a State Party to a dispute pending before the Court shall enjoy the following privileges, immunities and facilities:

a. Immunity from personal arrest or detention and from seizure of his personal baggage, and, in respect of words spoken or written and all acts done by him in his capacity as agent, immunity from legal process of every kind;
b. Inviolability of all papers and documents;
c. The right to use codes and to receive papers or correspondence by courier or in sealed bags;
d. Exemption in respect of himself and his dependents from immigration restrictions, aliens registration or national service obligations in the Netherlands in the exercise of his functions;
e. The same facilities in respect of currency or exchange restriction as are accorded to representatives of foreign governments on temporary official missions;
f. The same immunities and facilities in respect of his personal baggage as are accorded to diplomatic envoys;
g. In order to secure for the agent complete freedom of speech and independence in the discharge of his duties, the immunity from legal process in respect of words spoken or written and all acts done by him in discharging his duties shall continue to be accorded, notwithstanding that he is no longer Agent in a case pending before the Court;
h. Where the incidence of any form of taxation depends upon residence, periods during which the Agent is present in the Netherlands for the discharge of his duties shall not be considered as periods of residence.
i. An agent before the Court, the members of his family forming part of his household and personal service staff shall have neither a right to claim exemption from customs duties on goods imported (otherwise than as part of his personal baggage) or from excise duties or sales taxes (BTW) in the Netherlands.
j. An Agent shall be given, together with the members of his family forming part of the household, the same repatriation facilities in time of international crises as diplomatic envoys are given under the Vienna Convention on Diplomatic Relations adopted on 18 April 1961.
k. Privileges and immunities are accorded to the Agent not for personal benefit but in order to safeguard the independent exercise of his functions in connection with the Court. Consequently the Netherlands Government would stress its opinion that a State Party to a dispute pending before the Court not only has the right but is under a duty to waive the immunity of its Agent in any case where the Court so recommends and in the opinion of the State Party the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.

With respect to the special case of Mr. C. Argüello Gómez, Agent of the Republic of Nicaragua in three cases before the Court, who has decided to have his residence in the Kingdom of the Netherlands, the following shall further be applicable:

a. The private residence shall be inviolable;
b. Paragraph h. above will not be applicable. However, if his remuneration as Agent is subject to tax in the Republic of Nicaragua, the Netherlands will grant exemption of income tax to avoid double taxation.

Finally, the Ministry would like to stress that the institution of a permanent mission to the Court of States parties to a dispute before the Court is unknown.

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213. THE REGISTRAR TO THE MINISTRY OF FOREIGN AFFAIRS OF THE NETHERLANDS

26 October 1990.

The Registrar of the International Court of Justice presents his compliments to the Ministry of Foreign Affairs of the Kingdom of the Netherlands, and has the honour to acknowledge receipt of the Ministry's Note of 19 October 1990, under reference Protocol Department No. DKP-VI ISN-42891. Due note has been taken of the enumeration of the privileges, immunities and facilities which, in the view of the Ministry, are those to be enjoyed by an agent representing a State before the Court on the basis of the Exchange of Letters of 26 June 1946 between the President of the Court and the Netherlands Minister for Foreign Affairs, United Nations General Assembly resolution 90 (I) of 11 December 1946, and the Convention of 13 February 1946 on the Privileges and Immunities of the United Nations. It is also noted that it is proposed that certain variations in this enumeration shall apply in the particular case of His Excellency Mr. Carlos Argüello Gómez, Agent of Nicaragua.

The Registrar understands the purpose of the Ministry's Note to be for the guidance of Mr. Arguello Gomez, to whom the Registrar is transmitting a copy thereof, and not to invite the Court to consider the interpretation of paragraph V of the General Principles of the Exchange of Letters of 26 June 1946, with a view to agreeing with the Government of the Netherlands the precise scope of the obligation undertaken by that Government in subscribing to that paragraph of the General Principles, either in general, or in the specific case of Mr. Argüello Gómez. Accordingly, the Registrar expresses no view on that matter, but desires to place on record that the rights of the Court in this respect must remain entirely reserved.

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214. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

26 October 1990.

Further to my letter of 17 September 1990, I have the honour to transmit to Your Excellency herewith a copy of a Note dated 19 October 1990 received from the Netherlands Ministry of Foreign Affairs on the subject of the privileges, immunities and facilities enjoyed by Agents representing States before the Court, together with a copy of my reply of today's date.

215. THE AGENT OF THE REPUBLIC OF NICARAGUA TO THE REGISTRAR

12 September 1991.

I refer to the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.

Taking into consideration that the Government of Nicaragua and the Government of the United States of America have reached agreements aimed at enhancing Nicaragua's economic, commercial and technical development to the maximum extent possible, the Government of Nicaragua has decided to renounce all further right of action based on the case in reference and, hence, that it does not wish to go on with the proceedings.

It is my duty, therefore, to request that the Court make an Order officially recording the discontinuance of these proceedings and directing the removal of the case from the list.

216. THE DEPUTY-REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

12 September 1991.

I have the honour to acknowledge the receipt of a letter dated 12 September 1991 whereby the Government of Nicaragua has informed the Court of its decision to renounce all further right of action based on the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* and stated its wish not to go on with the proceedings.

I take note further that in this letter you have requested that an Order be made recording the discontinuance of the proceedings and directing the removal of the case from the list.

I shall not fail to inform you in due time of such action as may consequently be taken in accordance with Article 89 of the Rules of Court.

217. THE DEPUTY-REGISTRAR TO THE DEPUTY-AGENT OF THE UNITED STATES OF AMERICA

12 September 1991.

I have the honour to transmit to you herewith a copy of a letter of today's date from the Agent of Nicaragua in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, by which the Agent states the intention of the Government of Nicaragua not to go on with the proceedings, and requests that an Order be made officially recording the discontinuance of the proceedings, and the removal of the case from the list.

In accordance with Article 89, paragraphs 2 and 3, of the Rules of Court, the President of the Court has fixed 25 September 1991 as the time-limit within which the United States may state whether it opposes the discontinuance of the proceedings.

218. THE DEPUTY-REGISTRAR TO THE LEGAL ADVISER OF THE UNITED STATES DEPARTMENT OF STATE

(Facsimile)

12 September 1991.

I have the honour to transmit to you for information a copy of a letter I have today addressed to Mr. Patrick M. Norton, Deputy-Agent of the United States in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, and a copy of the enclosure to that letter (letter of today's date from the Agent of Nicaragua).

219. THE DEPUTY-REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA

12 September 1991.

Further to my letter of today's date, I have the honour to inform you that the Government of the United States of America, to whom I have sent a copy of your letter, also of this date, expressing your Government's wish to discontinue the proceedings brought against the United States in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, has been at the same time informed that the President of the Court, acting in accordance with paragraphs 2 and 3 of Article 89 of the Rules of Court, has fixed 25 September 1991 as the time-limit within which it may state whether it opposes the discontinuance in question.

220. THE LEGAL ADVISER OF THE UNITED STATES DEPARTMENT OF STATE TO THE REGISTRAR

25 September 1991.

On behalf of the Government of the United States, I have the honor to refer to your letter of September 12, 1991, concerning a letter from the Agent of Nicaragua in the case of *Nicaragua v. United States of America* informing the Court that the Government of Nicaragua does not wish to go on with these proceedings and providing the United States with an opportunity to state whether it opposes the discontinuance of the proceedings.

Taking into account the agreement of the United States and Nicaragua to take steps to enhance their friendship and mutual cooperation, including the renunciation by Nicaragua of all further right of action based on the aforementioned case, the United States welcomes the Nicaraguan request for discontinuance of the proceedings.

The United States takes this action without prejudice to its longstanding view that the Court is without jurisdiction to entertain the dispute and that the Nicaraguan Application of April 9, 1984, is inadmissible.

(Signed) Edwin D. WILLIAMSON.

221. THE REGISTRAR TO THE AGENT OF THE REPUBLIC OF NICARAGUA[1]

30 September 1991.

I now have the honour to transmit to Your Excellency herewith the sealed copy for the Government of Nicaragua of the Order of 26 September 1991[2] by which the President placed on record the discontinuance by the Republic of Nicaragua of the proceedings in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, and directed the removal of the case from the list.

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[1] A communication in the same terms was sent to the Legal Adviser of the United States Department of State.

[2] *I.C.J. Reports 1991*, p. 47.

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